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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 325.

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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Of Counsel.

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MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT.

Petitioners' summary statement contained in the petition for certiorari is entirely inadequate and respondent here sets out such statement as will indicate the facts and matters involved.

This is an action brought by the Maryland Casualty Company, as surety upon the construction bond of petitioner, Morley Construction Company, to require the application of the sum of $59,780.82, being the last payment upon the contract, to assure which the bond was given, to the payment of the unpaid claims for labor and material performed and used in the completion of such work.

The Morley Construction Company is a corporation organized under the laws of the State of Missouri with a capital stock of $10,000.00 which represented its sole assets (Tr. 58).

On or about July 23rd, 1932, petitioner, Morley Construction Company, entered into a written contract with the Veterans Administration Department of the United States for the construction of a veterans hospital in or near the city of Batavia, New York, for the contract price of $540,300.00 (Tr. 2-16-86).

Under the requirements of the Heard Act then in force, petitioner, Morley Construction Company, furnished to the Veterans Administration Department a bond in the sum of $275,000.00, conditioned upon the completion of the said contract and the payment of all bills for labor and material entering into the construction of such work, and respondent, Maryland Casualty Company, signed such bond as surety (Tr. 66).

Petitioner, Morley Construction Company, entered upon the performance of said contract and continued in the performance thereof until on or about the 28th day of April, 1933, at which time a substantial portion of the contract had been completed. On or about this date,

the Morley Construction Company became involved in labor difficulties and also became involved in financial difficulties to such an extent that they were unable to proceed with the performance of such contract and in writing notified the Maryland Casualty Company that they were in such a financial condition that they could not proceed with the work without financial assistance from their surety, the respondent, Maryland Casualty Company (Tr. 64). At that time in response to such letter of notification a contract was entered into between the petitioner, Morley Construction Company, and respondent, Maryland Casualty Company, which provided for the deposit in a trust company in the City of Buffalo of the sum of $5,000.00 by the Maryland Casualty Company, and the sum of $5,000.00 by the Morley Construction Company, to be used in the completion of the contract. The contract further provides that the Morley Construction Company would from time to time deposit other sums of money in such account to be used toward the completion of said contract, and further agreed to deposit in such account for the benefit of the said contract all monies and estimates received from the United States Government because of such work (Tr. 62). In such contract the Maryland Casualty Company agreed to deposit in such account monies to pay off the unpaid plaster claims of the laborers of the plaster contractor, Giamberardino & Sons, and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete such contract was termed reasonable and satisfactory to the Maryland Casualty Company. The contract provided that the Maryland

Casualty Company should have joint control with the Morley Construction Company of all monies deposited in such account and that no check, draft or withdrawal order should be drawn on the account without the approval of the Maryland Casualty Company or its named representatives, to be designated by the initials of the representative or representatives of the Maryland Casualty Company upon any check, draft or other withdrawal order.

Coincident with the execution of such contract the Morley Construction Company deposited in such account $5000.00 which it borrowed from B. D. Morley, one of its officers, and this sum in addition to the $10,000.00 representing the original capital of the company was all of the money ever put into this contract by the petitioner, Morley Construction Company (Tr. 58).

Coincident with the execution of the contract the Maryland Casualty Company also deposited in such account the sum of $5,000.00, and thereafter deposited in such account the additional sum of $5700.00 to pay the unpaid labor claims of the employees of Giamberardino (Tr. 60). The Morley Construction Company did not from time to time thereafter deposit any further money in this account to be used toward the completion of the contract. The Maryland Casualty Company did not thereafter deposit in said account any further sums to be used for the completion of the Giamberardino plastering contract. The completion of the plastering contract was sublet to one Hudson, and the payments to him which were made, were made from estimates which the Government allowed on account of the plaster work thereafter

done by Hudson, which were deposited in this joint account (Tr. 81-91). Other payments were made from such account by the President of the Morley Construction Company at the suggestion of the representative of the Maryland Casualty Company (Tr. 81-91).

The work provided for in the contract was completed on or about November 9, 1933, and a settlement statement made which showed the unpaid amount of the contract price to be $59,780.82 (Tr. 19).

At this time or about this time, the Morley Construction prepared and furnished to the representative of appellee, Maryland Casualty Company, a list of the laborers and materialmen who had furnished labor and material entering into the performance of said contract, which showed a total amount of unpaid claims of $107,666.23 (Tr. 88). These did not include the item of $5,000.00 which the Morley Construction Company had borrowed from B. D. Morley, and did not include the sum of $10,700.00, which had been advanced under the contract of April 28, 1933, by the Maryland Casualty Company to the Morley Construction Company. This account also did not include an item of $3,000.00 representing the claim of the Ithaca Trust Company against the Morley Construction Company, and did not include the further claims then in existence, of Giamberardino, the plaster contractor, for damages for an alleged breach of contract by the Morley Construction Company (Tr. 61), and did not include the claim of one Moody L. Rupp, the grading contractor, the amounts of which were not then disclosed (Tr. 83). The amount of named indebtedness totals $126,366.23, not in-

cluding the above mentioned claims of Giamberardino and Moody L. Rupp.

The only assets which the Morley Construction Company had were represented by the sum of about $7,900.00 which then remained in the joint account in the M. & T. Trust Company in Buffalo, and the unpaid balance of the contract price of $59,780.82 (Tr. 19-74-86), totaling the sum of $66,780.82. In addition to this sum representing cash, the Morley Construction Company claimed an extra item against the United States Government of approximately $11[illegible]00 (Tr. 73). They also had a claim against one Moody L. Rupp, the grading contractor, for $19,919.11 for his alleged breach of his contract, which was unliquidated and which Rupp was denying, and against which Rupp was asserting a claim for damages, or for services, against appellant, Morley Construction Company, the amount of which was not then disclosed (Tr. 73). This claim was against Rupp and his bondsmen, the New Amsterdam Casualty Company. It also claimed to have a claim against the plaster contractor Giamberardino and his surety, the National Surety Company, in the amount of $20,689.29 for damages on account of the alleged breach by Giamberardino of his plastering contract (Tr. 73). This claim was unliquidated and denied by Giamberardino, and Giamberardino, in addition to his claim shown in the list furnished the Maryland Casualty Company by the Morley Construction Company, was asserting a claim for damages for the alleged breach on the part of the Morley Construction Company of its contract. The amount of this claim of Giamberardino was not at the time disclosed. The National Surety Com-

pany, the surety upon the bond of Giamberardino and against whom the claim was being asserted, was then out of business. The total of these claims added to the cash of $66,780.82 amounted to $108,519.22. Of this amount the sum of $41,738.40 claimed as assets by the Morley Construction Company, was represented by these unliquidated disputed claims against which were asserted liabilities against the Morley Construction Company by two creditors. The only available funds with which to pay the obligations of the Morley Construction Company on this job were the cash items represented by the deposit in the bank of $7,900.00 and the final check due from the Government of $59,780.82 (Tr. 74).

At the time of the execution of the contract of April 28, 1933, the Morley Construction Company, in compliance with that contract, and on April 28, 1933, notified the United States Veterans Administration Department to forward all future estimate checks to the Morley Construction Company in care of the Manufacturers & Traders Trust Company of Buffalo, New York, for the attention of E. W. Miller, the Vice-President (Tr. 65). Supplementing the contract of April 28, 1933, an additional contract was prepared and signed by the Morley Construction Company and the Maryland Casualty Company for delivery to the Manufacturers & Traders Trust Company of Buffalo, New York, which referred to the previous contract entered into between the Morley Construction Company and the Maryland Casualty Company, providing for the deposit of the funds in the Manufacturers & Traders Trust Company, which contract recited that all of the monies deposited and to be deposited

pursuant to said contract should be the joint property of the Morley Construction Company and the Maryland Casualty Company (Tr. 77). The work of the performance of this contract by Morley Construction Company was under the supervision of its President, H. F. Morley, who signed both of the contracts for the deposit of the funds in the M. & T. Trust Company. The work involved in this contract was substantially completed in July, 1933, and H. F. Morley, the President of the company, in September, 1933, left Batavia, where the work was being done, and went to his home in Kansas City, Missouri, where the main office of the Morley Construction Company was located (Tr. 79). Sometime prior to November 9, 1933, and after Mr. H. F. Morley had gone to Kansas City, Missouri, he, in the name of the Morley Construction Company wrote to the United States Veterans Department directing them to send the remaining balance of the contract price, when it became due, to the Morley Construction Company in Kansas City, Missouri (Tr. 86). He did not notify the Maryland Casualty Company of this attempted change from the provisions of the contract of April 28, 1933, and the Maryland Casualty Company had no knowledge of such direction or change (Tr. 86).

After the acceptance of the work by the Veterans Administration Department on or about November 9, 1933, the Veterans Administration Department caused the Treasurer of the United States to issue a warrant under date of November 13, 1933, payable to the Morley Construction Company and representing the balance of the contract price on such work. This warrant, the Veterans

Administration Department, under the direction of the Morley Construction Company, so given to it by H. F. Morley after his return to Kansas City, sent to the Morley Construction Company in Kansas City, Missouri. The check was received by H. F. Morley, the President of the Morley Construction Company, who carried it in his pocket until November 22, 1933. The Morley Construction Company did not notify the Maryland Casualty Company and the Maryland Casualty Company had no knowledge of the sending of this warrant by the Veterans Administration Department to the Morley Construction Company until on or about November 23, 1933 (Tr. 86).

On November 22, 1933, Herbert F. Morley, the President of Morley Construction Company, took this warrant to its bank, the Merchants Bank in Kansas City, Missouri, and with it arranged for the purchase of a cashier's check in the name of Herbert F. Morley, Trustee. The warrant was endorsed by the Morley Construction Company to the Merchants Bank and the Merchants Bank prepared a cashier's check for the amount of the warrant, payable to the order of H. F. Morley, Trustee. The Merchants Bank retained the cashier's check and forwarded the warrant of the Veterans Administration Bureau through the Federal Reserve Bank in Kansas City, Missouri, for collection (Tr. 89).

On November 23, 1933, the Maryland Casualty Company at Washington, D. C., learned that this warrant had been issued and sent to the Morley Construction Company, and learned that it had been transmitted to the Treasurer of the United States for payment (Tr. 91). The Maryland Casualty Company, through its representatives in

Kansas City, Missouri, at once got into contact with Herbert F. Morley and inquired of him if he had received this warrant and was informed that he had. They then requested and demanded of him that the warrant or the proceeds therefrom be sent to the Manufacturers & Traders Trust Company, as provided in the agreement of April 28, 1933, for the disbursement in payment of bills for labor and material performed and used in the construction of the veterans hospital, provided for by the contract between Morley Construction Company and the Veterans Administration Department (Tr. 101). Herbert F. Morley, the President of the Morley Construction Company, refused to comply with this request (Tr. 101). The Maryland Casualty Company then further tried to contact either Herbert F. Morley, the President of the Company, or B. D. Morley, its other active officer, and was unable to get in contact with them, for the purpose of trying to procure the sending of this money to the Manufacturers & Traders Trust Company (Tr. 102). The Morleys refused to answer a long distance telephone call from the representative of the Maryland Casualty Company with whom they had had contact during the performance of the work and refused to answer the telephone calls or to see the local representatives of the Maryland Casualty Company (Tr. 102). Thereupon, and on the 25th day of November, 1933, the Maryland Casualty Company filed in the Supreme Court of the District of Columbia, an action against the Morley Construction Company and against the Treasurer of the United States, asking for an injunction against the payment out of this money to the Morley Construction Company direct, upon which

complaint the said Supreme Court of the District of Columbia issued on the 27th day of November, 1933, its show cause order, addressed to the Treasurer of the United States, ordering him to show cause, if any, why he should not be enjoined pending the hearing of the case upon its merits, from paying the warrant so issued to the Morley Construction Company, and why a receiver should not be appointed to receive and disburse such money under the direction of that court (Tr. 95). Nothing further was done in that action and it was still pending, undisposed of, upon the hearing of this cause. The respondent, Maryland Casualty Company, at the trial of this cause and in open court, stated that upon entry of a judgment for the relief there prayed in its complaint, it would dismiss the proceedings then pending in the Supreme Court of the District of Columbia (Tr. 110-111).

On the 27th day of November, 1933, the respondent, Maryland Casualty Company, filed in the District Court of the United States for the Western Division of the Western District of Missouri its bill of complaint against the Morley Construction Company and the Merchants Bank of Kansas City, Missouri, being the petition upon which this cause was tried.

The petition (Tr. 1) was based upon and set out three separate grounds for relief, the first being based upon claim of right to a specific performance of the contract of April 28, 1933. The second was based upon an alleged right of subrogation against the funds representing the final payment to the extent of $10,700.00 alleged to have been advanced by the Maryland Casualty

Company for the payment of labor and material claims. And the third right asserted was that of exoneration. The petition set up the facts with reference to the contract and bond and set out the then existing indebtedness and the then existing assets and the liability of the Maryland Casualty Company for the outstanding bills and the insolvency of the Morley Construction Company, and prayed that the Morley Company be required to exonerate the Maryland Casualty Company by the application of this final payment to the bills for labor and material entering into the construction work.

The Morley Construction Company in answer (Tr. 14) to the bill of complaint filed its combined answer, motion to dismiss and counterclaim, in effect denying the right of the Maryland Casualty Company to a specific performance of the contract and denying the right of the Maryland Casualty Company to the subrogation and denying the right of exoneration as set up in the complaint. The counterclaim was based upon the suit filed in the Supreme Court of the District of Columbia alleging that by reason thereof, the Morley Construction Company was unable to pay its outstanding bills, resulting in a multiplicity of suits and a threat of additional suits, and asking as relief that the Maryland Casualty Company be directed to dismiss the suit in the District of Columbia and to cease or end the prosecution of the case at bar. The reply placed at issue all of the allegations of new matter set out in the answer and counterclaim.

The case was tried before the court. At the close of the plaintiff's evidence, the motion to dismiss was denied

by the court (Tr. 103). During the examination of defendants' first witness, it having appeared from the statements made that both plaintiff and defendant had in mind the application or use of the fund involved in the warrant for the balance of the contract price to the payment of labor and material bills, an inquiry was made to the parties as to the necessity for the suit. Counsel for defendants announced to the court in answer to an inquiry by the court as to whether or not the case could be terminated, that the defendants before the filing of the suit had offered to let the money be deposited in Kansas City in a joint account if the plaintiff would dismiss the suit, and stated that the plaintiff was unwilling to do so, and indicating that if such a thing was done the case might be determined. The court then inquired of counsel for plaintiff if such an arrangement would be satisfactory, and counsel for plaintiff in open court announced that from the beginning the plaintiff had agreed that if the money would be deposited in a joint account anywhere, applying it to the payment of claims for labor and material, it would be satisfactory to plaintiff, but that the defendant had been unwilling to do so, giving as a reason the damage suffered by the defendant by reason of the bringing of the suit. Counsel for defendant, in answer thereto, announced that plaintiff had only made the suggestion of depositing the money for the purpose of paying such bills for labor and material conditioned upon the giving by the defendant to the plaintiff of a release for any liability on account of the bringing of the suit upon which statement, plaintiff agreed in open court that if the defendant would place the money anywhere in

the United States under the joint control of the plaintiff and defendant for the payment of bills for labor and material, the plaintiff would dismiss the suit without any commitment or release by the defendant as to its future actions. Whereupon, the court stated the proposal, as he understood it, that the plaintiff would be willing to dismiss the suit if the money was deposited in a joint account to be disposed of under the joint control of the plaintiff and defendants, and that the plaintiff was willing to dismiss it without any restrictions of the right of the defendants to bring any suit they might want to bring, and stated that he did not see why the parties could not come to an agreement. A recess was taken for the purpose of disposing of the case by agreement, after which counsel for plaintiff announced to the court that they had not been able to agree because the defendants refused to permit the money to be deposited subject to joint control, and because defendants insisted that they be permitted to use the funds so deposited in the prosecution of the claims of defendants against defaulting contractors and claims of the defendants against the Government (Tr. 110-111-112). Whereupon, the trial of the case was continued to a conclusion. On October 2, 1934, the court decided the case, filing a memorandum of opinion of the court and the findings of fact and conclusions of law of the court, together with its opinion (Tr. 120-125). In the findings of fact, the court found that all of the monies, including the final payment, should be deposited in the Manufacturers & Traders Trust Company under the agreement of April 28, 1933, and found that the Maryland Casualty Company had not advanced the money to

pay the labor for the completion of the plasterer's contract, and upon this finding of fact in his conclusions of law held that the plaintiff was not entitled to a specific performance of the contract of April 28, 1933, because the Maryland Casualty Company had not fully complied with the contract on its part. In his findings of fact the court found that the $5,000.00 deposited by the plaintiff in the joint account under the agreement of April 28, 1933, and the $5700.00 thereafter deposited in such account, were advancements made by the plaintiff to the defendant and hence were not payments made direct for labor and material, and denied to the plaintiff the prayer for a subrogation to the extent of such advancements. The court in its findings of fact found that when the bill was filed, claims against the Morley Construction Company in favor of those who had furnished labor and material on the contract, which amounted to more than $100,000.00, had matured and were due and payable, and held that the plaintiff was entitled to exoneration by the defendant, and upon such findings of fact and conclusions of law entered the decree in the case ordering that the defendant, Morley Construction Company, exonerate and hold the Maryland Casualty Company harmless, and ordering that the Morley Construction Company promptly pay all labor and material claims arising on the hospital job and that they apply to such payment all monies it then had or which it might thereafter realize from the performance of the contract, including the sum of $59,780.82 represented by the United States Treasury warrant of November 13, 1933, and including the proceeds of any other warrant or warrants

which might be issued in the place of such warrant and including all other assets of the defendant, Morley Construction Company, which it then had or might thereafter acquire, in so far as the same might be necessary for the payment of labor and material claims incurred in the performance of the hospital contract, excepting only the proceeds which the Morley Construction Company might derive from the performance of any other contract which might be required for the payment of labor and material claims incurred in the performance of such other contracts, and ordered that the defendant, Morley Construction Company, deposit the proceeds from the United States Treasury warrant in some bank to be designated as a special trust fund for the payment of bills for labor and material used in the construction of the United States Veterans Hospital at Batavia, New York, and ordering that the cross bill of the defendants be dismissed.

From this order and judgment appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit.

The Circuit Court of Appeals, upon a hearing, affirmed the decision of the District Court, and by its decree remanded the cause to the District Court with directions to modify its decree in accordance with the views expressed by the United States Circuit Court of Appeals (page 126, Transcript) and adjudging that the decree so modified was by the court affirmed. In the opinion of the United States Circuit Court of Appeals (page 126, Transcript), the Court of Appeals discusses the question of exoneration and of specific performance, and indicates that as to the right of exoneration, the

suit was prematurely brought inasmuch as it was brought before the six months' period within which the Government was entitled to first have recourse under the bond, expired, and while not definitely deciding that question, stated in its opinion that the Court of Appeals preferred not to place the relief granted on the basis of exoneration but rather on the basis of specific performance of the agreement of April 28, 1933 (page 138, Transcript). With this expression in the opinion, the court entered the decree affirming the decision of the District Court as shown on page 138 of the Transcript of the Record. This opinion is reported in Vol. 84 F. (2) 527.

The decree of the United States Circuit Court of Appeals was rendered on June 26, 1936, and on July 7, 1936, petitioner filed its petition for a rehearing in the Circuit Court of Appeals, which was on July 20, 1936, denied. A motion for a stay of the issuance of the mandate was filed on July 30, 1936, and on August 3, 1936, on such motion a stay of 30 days was given in order to permit the filing of a petition for certiorari.

Such petition for a writ of certiorari was filed in this court, and on October 12, 1936, by its order made and entered, this court granted the petition for certiorari.

On the 24th day of November, 1936, respondent received from the clerk of this court, copies of the printed Transcript of the Record, since which time respondent has received no brief or further evidence of the prosecution of petitioner's certiorari.

POINTS AND LIST OF CASES.

I.

The Circuit Court of Appeals had the right to consider any point raised by the issues and to modify the decree of the District Court, even though its reasons for so doing were contrary to the ones given by the District Court.

The Maria Martin v. *Transportation Co.*, 12 Wall. 31, 20 L. Ed. 251.
Peoria & Pekin Railway Co. v. *United States, et al.*, 263 U. S. 528, 68 L. Ed. 427.
Bolles v. *Outing Co.*, 175 U. S. 262, 44 L. Ed. 156.
O'Neill v. *Wolcott Mining Co.*, 174 Fed. 527.
2 Rul. Case Law, Section 156, page 184.
2 Ruling Case Law, Section 155, page 182.
Cleary v. *Foundry Co.*, 132 U. S. 612.
Merchants & Manufacturers Securities Co. v. *Johnson*, 69 Fed. (2d) 940.
Blackhurst v. *Johnson*, 72 Fed. (2d) 644.
Alexander v. *Cosden Pipe Line Co.*, 290 U. S. 484, 74 L. Ed. 452.
United States v. *Express Co.*, 265 U. S. 425.
Bothwell v. *United States*, 254 U. S. 231, 39 A. L. R. 56.
Cherokee Nation v. *Black Feather*, 155 U. S. 218.
Swager v. *Smith*, 194 Fed. 762.
Lagnes v. *Green*, 282 U. S. 531.
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Dean v. *Davis*, 212 Fed. 88.
Mound City v. *Castleman*, 187 Fed. 921.
Guarantee Company v. *Phoenix*, 124 Fed. 170.
Harding v. *Federal National Bank*, 31 Fed. 914.

II.

The respondent, under the facts and the law, was entitled to specific performance of the contract of April 28, 1933.

Becker v. *Becker*, 250 Ill. 117, 95 N. E. 70.
Shubert v. *Woodward*, 167 Fed. 47.
Michigan Pipe Co. v. *Fremont Ditch Co.*, 111 Fed. 284.
Fitzgerald & Remick v. *Britt*, 43 Iowa 498.
Work v. *Welsh*, 43 N. E. 719, 160 Ill. 468.
Van Dyke v. *Cole*, 70 Atl. 593, 81 Vt. 379.
City of LaFollette v. *LaFollette Water Co.*, 252 Fed. 762.
Taylor v. *Longworth*, 14 Peters 172.
Shaw v. *Livermore*, Volume II, Green's Reports (Iowa) 338.
Bell v. *Warren*, 39 Texas 106.
Morley Construction Co. v. *Maryland*, 84 Fed. (2d) 522.

III.

The copy of the contract, Defendant's Exhibit 3, did not supersede the contract of April 28, 1933, nor was such contract changed by changing the deposit account in the M. & T. Trust Company from Morley Construction Company to H. F. Morley.

IV.

The contract of April 28, 1933, did not constitute an assignment in violation of Section 203, Title 31, U.S.C.A.

V.

There was no substantial breach by respondent of the contract of April 28, 1933.

VI.

The respondent had the right to have the funds represented by the United States warrant of November 13,

1933, so impressed as to be made available for the payment of the labor and material bills under the contract.

VII.

Respondent was entitled to exoneration by petitioner out of the funds resulting from the construction work covered by the contract, for which respondent's bond was given.

21 Ruling Case Law, paragraph 146, pages 1110 and 1111.

Southwestern Surety Co. v. *Wells*, 217 Fed. 294.

Glades County v. *Detroit Fidelity Co.*, 57 Fed. (2d) 449.

U. S. F. & G. v. *Bank of Brewton*, 4 Fed. Supp. 272.

Prairie State Bank v. *United States*, 164 U. S. 227.

Pavarini v. *Title Guaranty & Surety Co.*, 36 App. Cas. (D. C.) 348, Ann. Cas. 1912C, 367.

West Huntsville Cotton Mills Co. v. *Alter*, 164 Ala. 305, 51 So. 338.

Ferer v. *Barrett*, 57 N. C. 455.

Thomas v. *St. Paul's M. E. Church*, 86 Ala. 138.

Hutchinson v. *Brand*, 79 Kans. 340, 99 Pac. 592.

Roberts v. *American Bonding Co.*, 83 Ill. App. 463.

Pratt Lumber Co. v. *Gill*, 278 Fed. 783.

Town of Gastonia v. *Engineering Co.*, 131 N. C. 359, 42 S. E. 857.

Stulz-Sickles Co. v. *Fredburn Corp.*, 169 Atl. 27, 114 N. J. Eq. 475.

Greenberg v. *Leff*, 146 Atl. 196, 104 N. J. Eq. 502.

Bishop v. *Day*, 13 Vt. 81, 31 Am. Dec. 582.

Holcombe v. *Fetter*, 70 N. J. Eq. 300, 67 Atl. 1078.

Dobie v. *F. & C. of N. Y.*, 70 N. W. 482, 95 Wisc. 540.

Wells v. *City of Philadelphia*, 270 Pac. 42, 112 Atl. 867.

ARGUMENT.

I.

The Circuit Court of Appeals has the right to consider any points raised by the issues and to modify the decree of the District Court, even though its reasons for so doing were contrary to the reasons given by the District Court.

Petitioner, in its brief accompanying its petition for the Writ of Certiorari, gives as its main reason for a review by this court that the Circuit Court of Appeals, in modifying the decision of the District Court denying specific performance, was acting without authority under the law applicable to the case and to the issues set up, because respondent was defeated in the trial court by the denial of the prayer for specific performance and, as it did not appeal from the decision and decree of the trial court, the Court of Appeals had no jurisdiction or authority to modify the decree so as to grant the relief under the plea for specific performance. In support of this statement, petitioner refers to a number of cases set out in its brief, beginning on page 22.

We may, in the inception of the argument concede that the general rule, and particularly in cases at law, is that an appellee cannot complain of an adverse ruling in the lower court, without taking a cross appeal in the case. And that is the effect of the cases cited by petitioner. This general statement of the law, however, does not prevent the appellee from raising any point on the appeal which tends to uphold the decree, and this general

rule is not applicable to a review of a case in equity where the appellate court has the right to review the whole case on the facts and the law and to arrive at what it conceives to be a just decision upon the law and the facts, even though in such review in its reasons for the decision given it does not agree with the reasons given by the lower court for its decree.

This is a suit in equity in which the respondent is seeking relief to which it is unquestionably entitled. It had, and has, but one purpose, and that is to see that the proceeds from the contract, the completion and payment for which respondent executed its bond as surety, were applied to the payment of bills for labor and material used in the completion of the contract. It gave as its reasons in the Bill of Complaint (page 1, Transcript):

Three grounds, upon any of which, or upon all of which, as the court might see fit, the court might have held that the money representing the unpaid purchase price should be applied in liquidation of the labor and material bills, were set out in the complaint. So far as respondent was concerned, it did not matter for what reason the relief was given, if the relief was actually given. So far as respondent was concerned, and so far as the District Court was concerned, it would not have been necessary for the court to have given any reason for its decree, and the court might well have simply entered its decree granting to the respondent the relief it sought; in which event, unquestionably, on appeal the appellate court without reasons for affirmance could have simply affirmed the judgment, which would have given to respondent, finally, the relief it was seeking. The

fact that the court in an equitable proceeding gave the wrong reason, if it did, while rendering the correct relief or judgment, would not make such determination invalid. This has been determined so often in equity cases that there should be little room for argument.

Respondent has cited and quoted from a number of cases, but an examination of them will indicate that in most instances they were actions at law, and in each instance it can be shown that the decisions were not applicable to the exception to the general rule hereinbefore referred to.

The case of *The Maria Martin* v. *Trans. Co.*, 12 Wall. 31, 20 L. Ed. 251, cited on page 22, petitioner's brief, was a libel action filed by the owners of the ship Cleveland against The Maria Martin for damages on account of a collision. The District Court dismissed the libel action and libellant appealed to the Circuit Court of Appeals. On appeal the Circuit Court of Appeals held that both parties were in fault and reversed the District Court and entered a decree that each party should pay a portion of the damages and each its own costs. The Bark Maria Martin appealed from the decision of the Circuit Court of Appeals and the libellant did not appeal. The Supreme Court simply held that as libellants had not appealed from the decree of the Circuit Court of Appeals on the holding of negligence, the holding was conclusive as to them. Apparently, libellants were seeking to reverse the decree which established their negligence and thus were seeking to overdraw, not to sustain the decree of the

Circuit Court of Appeals. The court in its opinion in the portions cited by petitioner states:

> "But where only one party appeals, the other is bound by the *decree* in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, *except in support of the decree* from which the appeal of the other party is taken" (italics ours).

In the case of *Peoria & Pekin Railway* v. *United States, et al.*, 263 U. S. 528, 68 L. Ed. 427, the Interstate Commerce Commission had ordered the Peoria Railway Company to exchange traffic with the Minneapolis & St. Louis Railway Company. The Peoria Company, taking the position that the Interstate Commerce Commission was without authority to enter such an order, brought an action in the District Court to enjoin the enforcement of the order. A mandatory injunction was denied and the Peoria Company took a direct appeal to the United States Supreme Court, where contention was made by the Peoria Company that such an order could not be made without notice and full hearing, and no notice or hearing had been given or had, prior to entering the order. In the Supreme Court the Interstate Commerce Commission contended that as the residence of the Minneapolis Railway Company was in the State of Iowa, the proper venue was in the District Court of Iowa. In the District Court the Peoria Railway Company had raised this point as an objection to the right of the Interstate Commerce Commission to enter the order without notice or hearing.

The court ruled that as the venue provision was for the benefit of the Minneapolis Railway Company it could

be waived by the railway company. An objection was made in the trial court to the introduction of evidence on this question, which was sustained and the court held as no appeal was taken from this ruling the question could not be raised on appeal.

The case of *Bolles* v. *Outing Co.*, 175 U. S. 262, 44 L. Ed. 156, cited on page 23 of petitioner's brief, was an action brought by Bolles for the infringement of a copyright. In the trial in the District Court the bill was dismissed on the ground that the copyright stamp used was insufficient notice of the copyright. Bolles sued out a writ of error to the Circuit Court of Appeals, which court held that the stamp was sufficient, and for that reason the bill should have been dismissed, but sustained the trial court in the exclusion of certain evidence which was offered and the case was sent back for a new trial. In the new trial, the trial court refused to permit certain evidence offered by the plaintiff as to the number of the copies of the publication which had been found in defendant's possession at any time prior to the commencement of the action. It was shown that one magazine carrying the copyrighted article was purchased by an employee of the defendant. The court allowed a judgment of $1.00, for the one publication shown in evidence, being the statutory penalty for each sheet containing the copyrighted article. The plaintiff appealed to the Circuit Court of Appeals where the decision of the lower court was affirmed. The plaintiff brought the case to the Supreme Court and the defendant did not appeal from the judgment for nominal damages. There were

two other defenses interposed in addition to that on which the court rendered its decision, which, if sustained, would have prohibited the allowance of even nominal damages. The defendant sought to invoke these defenses, not in support of the decree rendered, but for the purpose of procuring an adjudication that the plaintiff was not entitled even to nominal damages, and this court held that as the defendant did not sue out a writ of error, he could not be heard to complain of any adverse rulings of the court below. Defendant was seeking not to uphold or support the decree, but was seeking to procure another decree than that entered. This, also, was a law action.

In *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527, (8th Circuit), cited on page 24 of petitioner's brief, the Wolcott Mining Company received from a mutual agent for a seller and a buyer a certificate of stock properly endorsed and requested the mining company to transfer it to the buyer. The mining company delivered the certificate and assignment to the agent without the knowledge or consent of the buyer who had paid $2000 for it.

The buyer brought a suit to compel the transfer of stock and the trial court dismissed the Bill of Complaint. In answer, the defendants set up that four other named persons were necessary parties to the action and who were not named as parties.

The complainant appealed from the decision of the District Court to the Circuit Court of Appeals. There, the defendants sought to raise the point that the decree of dismissal should be affirmed because these named parties were not made parties to the original action.

The court held (l. c. 535), that if the parties alleged to be necessary parties were necessary parties, that fact would reverse, not sustain, defendants' decree below, and that having taken no appeal, the defendants could not be heard in the Supreme Court to urge any error which would set aside the result in their favor; that they could present only contentions which would support the decree, and that if appellee took no appeal, he could not raise a point in the appellate court to review decisions against him in the court below, "much less can he be heard to challenge rulings too favorable to him."

On page 24 of petitioner's brief is cited 2 Ruling Case Law, Section 156, and it is stated that this work cites *O'Neil* v. *Wolcott Mining Co., supra*, as the original leading case in support of the text quoted as:

> "* * * A party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below."

We do not find this case cited in support of or under paragraph 156 in 2 Ruling Case Law, but we do find it cited in support of Section 155, where it is stated:

> "As a general rule, the appellee or defendant in error who has not appealed or sued out a writ of error cannot assign error, the right to assign errors being restricted to the appellant or plaintiff in error."

On page 25 of petitioner's brief is set out a sentence quoted from 2 R. C. L., page 182. This section is correctly quoted so far as it goes, but petitioner neglects to add the first four words of the sentence, which are:

"As a general rule." Adding these words, the sentence reads as we have heretofore quoted it from Section 155 in 2 Ruling Case Law.

In the case of *Cleary* v. *Foundry Co.*, 132 U. S. 612, cited by petitioner on page 25 of its brief, a suit had been brought by Cleary to recover from the defendant the amount of an insurance policy alleged to have been received by the defendant. This was a law action. The defendant denied that it had received such proceeds and plead the statute of limitations. At the close of the evidence the plaintiff asked for certain instructions, which were refused by the court which, apparently, asked the court to direct the jury to find the plaintiff entitled to all of the proceeds of the insurance policy. The court held that the plaintiff was only entitled to recover what would have been the cash surrender value of the policies at the time of the bankruptcy, and instructed the jury to return a verdict for $1200, which was the agreed amount of the cash surrender value. The plaintiff appealed and the defendant did not. There is nothing in the record to indicate that the defendant raised any point on appeal, but this court, in the decision, commented on the fact that the court was wrong in giving the peremptory instruction and also commented on the fact that the limitation period had passed, but stated that the defendant had not appealed from the decision. This case does not reach the question involved here.

In the case of *Merchants S. Co.* v. *Johnson*, 69 Fed. (2d) 940, cited on page 25 of petitioner's brief, the Mer-

chants Company filed a claim against Johnson, who was the receiver of the Atlantic & Pacific Oil Company in a receivership proceeding, claiming that certain amounts collected by the oil company were proceeds from accounts which were owned by the Merchants Company and were trust funds to which the Merchants Company was entitled. This was an action at law. The defense was made that the accounts were usurious, and that the Merchants Company was a foreign corporation which had not procured a license to do business in Missouri and hence not entitled to maintain the action. The District Court allowed the claim as a general claim, but denied the right to enforce the assignments and held the contract usurious. The Merchants Company only appealed. There were but two questions presented in the lower court—that of usury and the disqualification of the defendant by reason of having no license in the State of Missouri. The defendant took no appeal. The court having found against defendant on the claim that the plaintiff had no license to do business in the State of Missouri, and in defendant's favor on the ground of usury, the defendant sought to raise in the Court of Appeals the question of the lack of license of the plaintiff, not to overthrow, but to sustain the judgment which was against the defendant. The Court of Appeals refused to consider this contention as the defendant had not appealed from the finding which was against him. The Circuit Court of Appeals commented on the fact that this case presented a strange anomaly in that the appellant was trying to upset a judgment which was in his favor and the appellee was trying to sustain a judgment which was against him.

The case of *Blackhurst* v. *Johnson*, 72 Fed. (2d) 644, cited on page 25 of petitioner's brief, was a petition in equity to set aside a trust created, apparently by a deed, as being against the rule against perpetuities. There was a decree for the defendants which, on appeal taken by the complainant, was reversed. On the appeal, the guardian *ad litem* for one infant grandchild attempted to raise the issue in the Court of Appeals that the deed in trust was testamentary in character and not being executed according to the laws of Missouri was void. This party did not appeal and the court held where no appeal was taken the guardian *ad litem* could be heard only in support of a decree, and not against it. This case is not in point.

The case of *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 74 L. Ed. 452, was an action brought by Cosden Company to recover certain excise taxes on crude oil alleged to have been illegally exacted by Alexander, Collector of Internal Revenue. The petition sets out four different claims based upon shipments during certain periods of time. It is a law case and a jury was waived and the District Court found for the plaintiff for the full amount of the first claim and the second claim. The third claim the District Court reduced from $36,666.50, the amount claimed, to $18,333.25, and reduced the fourth claim of $995.90, the amount claimed, to $746.92. The defendant, Alexander, the collector, only appealed to the Circuit Court of Appeals. The Circuit Court of Appeals sustained the District Court on the full amounts of the first and second claims, but reversed the District Court

as to the third claim and rejected it entirely and reduced the amount of the fourth claim of $746.92, allowed by the District Court, to the amount of $375.71. The Cosden Company, the plaintiff, thereupon voluntarily remitted the whole of the third claim and the sum of $375.71, the amount disallowed by the Court of Appeals on the fourth claim. The defendant Alexander filed his Petition for Certiorari in this court, which was allowed. The plaintiff did not file a Petition for Certiorari. It was here held that the plaintiff, the Cosden Company, not having appealed, was not entitled to be heard in opposition to the action of the decision of the Circuit Court of Appeals, in opposition to its finding, but could only be heard on matters urged in support thereof; that the plaintiff had consented to the disallowance of claim three and to the reduction of claim four and hence was not entitled to question the action of the Circuit Court of Appeals in regard to the matters which it had approved. This case is not contrary to the doctrine here contended for by the respondent.

In the case of *United States* v. *American Express Co.*, 265 U. S. 425, the American Express Company brought a suit to enjoin the Interstate Commerce Commission from enjoining an order establishing a through route to be used by the American Express Company. The real question presented for determination was whether or not the American Express Company was a "carrier by railroad" under the meaning of the Transportation Act of 1920. The Express Company, the complainant, in addition to its contention that the order was void because the

Act did not include the Express Company within the meaning "Carrier by Railroad," also contended that the order exceeded the powers of the Commission because unreasonable and because, for other reasons there given, the order of the Commission was not good. The trial court held that the American Express Company was not a "carrier by railroad" and granted the injunction. The Interstate Commerce Commission took an appeal to this court. The Southeastern Railroad Company, at whose request, apparently, the order establishing the through route was made by the Interstate Commerce Commission, was a party to the proceeding. In the hearing in this court, apparently, the American Express Company raised the question of the impropriety of the order on account of its being unreasonable, as well as the ground that the Express Company was not a "carrier by railroad."

The District Court apparently overruled the contention of the American Express Company that the order given was without authority because it exceeded the powers of the Commission and because it was unreasonable. The American Express Company took no appeal, but sought to again press these reasons in this court. The court, commenting on the situation, says, l. c. 235:

> "The Southeastern insists that these claims, although adequately presented in the Bill of Complaint, cannot be availed of in this court because they were overruled by the District Court and the American did not take a cross appeal. This objection is not sound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in

opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or in lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree to correct a matter not dealt with below. But it is likewise settled that appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, or to an insistence upon matters overlooked by it."

This case, instead of being contrary to, supports the right of the Court of Appeals to affirm the decision in the instant case for reasons other than given by the District Court.

The case of *Bothwell* v. *United States*, 254 U. S. 231, 39 A. L. R. 56, cited by petitioner on page 24 of its brief, is a case in which the land of the plaintiff had been taken by the United States in a condemnation proceeding. In the condemnation proceeding the owner had filed a claim for the difference in value between the land before and after the conditions resulting from the reclamation proceeding, and also filed a claim for damages for the destruction of certain hay caused by floods growing out of the condition resulting from the condemnation proceeding, and also for damages occasioned to him by being required to sell cattle at a loss which were on the land at the time the flood conditions arose. The District Court allowed the difference in the value of the land, but denied the claimant his claim for the loss of hay

and for the loss in the value of the cattle. No appeal was taken by either side. A separate suit was then filed to recover from the Government the value of the items, a claim for which had been denied in the condemnation proceeding. The only thing held in this case was that no appeal having been taken in the other proceeding, the judgment there was a final one which could not be attacked in the instant case. This case is not authority for the contention of the petitioner.

On page 24 of the brief the petitioner cites the case of *Cherokee Nation* v. *Black Feather*, 155 U. S. 218. We do not find such a case, where cited, but in that volume on page 218 is reported such a case. This was an action brought, apparently at law, by the Shawnee Indians to enforce a claim for an equal interest in the Cherokee Indian Reservation. Apparently, an allowance was made per capita to each of the Shawnee Indians and the case was brought here on the appeal of the Cherokee Nation. In this court, apparently, the Shawnee Indians made application in which they asked for the decree to be modified increasing the amount per capita allowed. It was simply held in the case that the Shawnee Indians could not be heard to question the correctness of the amount allowed to them, as they had not appealed. This case is not in point.

Petitioner, on page 24 of its brief cites the case of *Swager* v. *Smith*, 194 Fed. 762. This case involves a bankruptcy proceeding in which a vendor of a hotel property had sold it and had taken back a deed of trust as

a part of the purchase price, which covered a moving stock of liquors, etc. He filed his note and deed of trust as a secured claim. The referee in bankruptcy, before whom the claim was filed, held that the deed of trust was void under the West Virginia law as covering movable stock, and allowed the claim only as a common or unsecured claim. The holder of the note and deed of trust appealed to the District Court, which sustained the ruling of the referee. The holder of the note thereupon took an appeal to the Circuit Court of Appeals. In the Circuit Court of Appeals the appellee, not having appealed, in his brief asserted the illegality not only of the deed of trust, but also of the whole contract, and sought not to have the decree of the District Court affirmed as given, but sought to have the whole claim denied even as a common claim. The court simply held that as the appellee had taken no cross appeal, he could not raise the question which permitted him to change the decree of the District Court by entirely eliminating the claim of the claimant as a common creditor. The Circuit Court of Appeals affirmed the decision of the lower court. So far as the record shows, the question of the illegality of the claim as a common creditor was never asserted in the lower court, and the only question there raised was as to the validity of the deed of trust. This case is clearly within the general rule and is not authority against the position of the respondent here.

This court and the Court of Appeals in recent and applicable decisions have unquestionably held that in an equity proceeding the appellate court may consider law and all the facts in the lower court and may give such

decision as is deemed just, and unquestionably hold that the Circuit Court of Appeals had the right, as it did in the instant case, to grant the relief prayed for, even though, in its judgment, the relief should have been granted for other reasons than those given by the District Court.

Perhaps one of the clearest cases is that of *Lagnes* v. *Green,* 282 U. S. 531. In this case Green, on October 11, 1927, brought an action in the state court against Lagnes, the owner of the vessel Aloha to recover $25,000 damages for personal injuries alleged to have been suffered by him while employed on the ship.

Section 4383, Revised Statutes (U.S.C.A., Title 46, Section 83) limited the liability of a ship owner in certain named instances to the value of his vessel. In this case it was stipulated that the vessel Aloha was of no greater value than $5000.

Just two days before the state case was set for trial, Lagnes, the owner of the vessel, filed a proceeding in the Federal District Court, asking to have his limit of liability for his damages adjudicated under this section. The Federal District Court issued an order restraining the proceedings in the state court and issued an order to all claimants against Lagnes to present their claims in that action within a fixed time. Green, in response to the order, filed his claim for $25,000 for personal injuries, and no other claims were filed. Green then moved to dismiss the restraining order on the claim that the state court had jurisdiction of the cause; that

there was only one possible claimant and one owner, and that Lagnes might set up his claim of limitation of liability in the state court. This motion was denied and apparently no further action taken regarding such ruling.

The District Court then proceeded to try Green's claim, deciding it would first inquire whether there was any liability, and that then, upon such hearing, if a liability was established, the court would take up the question as to whether it should be limited. Upon the conclusion of Green's testimony, the District Court held there was no liability, and, without deciding upon whether or not the limitation section could be enforced in the state court, entered a decree that there was no liability of Lagnes to Green. From this decision Green appealed.

In the Circuit Court of Appeals Green assailed the judgment of the District Court on two grounds. First, there being but one possible claim and but one owner, that Lagnes should have sought his remedy by pleading in the state court the contention which the District Court had not passed upon.

And second, that the record disclosed privity and knowledge of the owner with respect to Green's injury, which took the case without the provisions of Section 4383.

The Circuit Court of Appeals reversed the decree of the District Court and remanded the case to the District Court with directions to dismiss the case for want of jurisdiction, and in such decree, or in the opinion supporting the decree, rejected the first ground of Green's contention, that the state court had jurisdiction, and sustained the second contention made by Green, that inas-

much as the evidence showed privity and knowledge of Lagnes, Section 4383 did not apply, and, consequently, the District Court was without jurisdiction of the cause.

Green brought the case to this court and this court held that the Court of Appeals was wrong in its holding that the second ground of Green's complaint, that the Federal Court did not have jurisdiction because of the privity and knowledge of the owners shown, did not present a jurisdictional question, and held that the District Court had jurisdiction to pass on Green's claim and that its determination either way was a determination of that question. This court then declined to further consider the second ground upon which Green assailed the District Court's finding, because this court held that its conclusion upon the first ground—that is, as to whether or not the state court had jurisdiction to try out the question of liability —was that both the District Court and the Circuit Court of Appeals were in error. The petition for certiorari to this court was filed by Lagnes, and he contended that since Green had not applied for certiorari, and since the decision of the Circuit Court of Appeals was against him on point 1—that is, the question of the state court's jurisdiction to apply the limitations statute, had been decided against Green by the Circuit Court of Appeals, this propriety of the action of the Court of Appeals on point 1 was not open for consideration before this court. This court held that this contention was without merit and held, notwithstanding that Green filed no petition for certiorari, that the District Court was wrong in not dissolving the restraining order and permitting Green to pursue his action in the state court, and was also

wrong in the hearing and determining of the personal injury action.

This court also held that the Circuit Court of Appeals was wrong in overruling the contention of Green that he should be permitted to pursue his case in the state court and wrong in dismissing the case because it was shown that Lagnes had privity and knowledge of Green's injury, and held that Green could pursue his state court remedy, but that the action in the Federal Court should not be dismissed, and should be kept alive, awaiting a determination of the state court for such action as might thereafter become necessary. In this case this court made its own decision considering the contentions of Green and passing upon them, although he had not applied for a certiorari.

In the case of *Public Service Commission of Puerto Rico* v. *Havemeyer,* 296 U. S. 506, the case arose over an order made by the Public Service Commission of Puerto Rico. A franchise had been issued by the Public Service Commission to an applicant, which had been assigned to Russell & Company. An application was made by certain owners of property in a basin served under the irrigation franchise for a revocation of the franchise, for the reason that Russell & Company had not complied with the terms of the franchise with respect to maintaining the level in the water reservoir, as a result of which their lands had been overflowed and damaged. On this application the Public Service Commission cancelled the franchise. Russell & Company took an appeal to the District Court of San Juan, which court sustained the

action of the Commission and cancelled the franchise. The District Court, however, in its judgment deemed that it was only required to decide whether or not the order was reasonable and, upon hearing, found that the order was reasonable and dismissed the appeal from the order of the Public Service Commission.

Russell & Company, by proper appeal, took the case to the Supreme Court, which, passing only on the question of the reasonableness of the order, affirmed the judgment of the District Court of San Juan, holding the Commission's order reasonable.

Russell & Company then took an appeal to the United States Circuit Court of Appeals for the First District and the Circuit Court of Appeals, finding that the order was unreasonable, reversed the decision of the Supreme Court. Thereupon, the Public Service Commission filed its petition for a writ of certiorari to this court, which was granted. Apparently, no question of the jurisdiction of the Public Service Commission to make the order had been raised up to the time of the granting of the writ of certiorari, and Russell & Company did not apply for a writ of certiorari to this court, having received the relief they sought. To support their position Russell & Company apparently asserted in this court, not only that the order was unreasonable, but also asserted that, although they had not questioned or objected to the judgment of the Circuit Court of Appeals, which was in their favor, here, for the first time, asserted that the decision of the Circuit Court of Appeals was correct, not only for the reason that the order was unreasonable, but also contended that even if the order was reasonable, the

Public Service Commission was without authority to cancel the franchise. Russell & Company, without having asked for a certiorari, were raising in this court for the first time a reason in support of the judgment of the Circuit Court of Appeals which had not theretofore been raised. This court said, l. c. 509:

> "Notwithstanding the absence of a cross petition, we may consider respondent's insistence that the Commission was without authority to make the order."

In the case of *Stelos* v. *Hosiery Co.*, 295 U. S. 237, an action was brought by the Stelos Company against the Hosiery Corporation for the infringement of a patent. In defense, by way of answer, defendant claimed that the patent was invalid by reason of the failure of the plaintiff to make proper disclosure of the invention and invalid by reason of anticipation and also denied that there was an infringement. The District Court found for the defendant for the reason that there was no infringement of the patent and apparently did not give the invalidity of the patent as a reason for finding for defendants.

On plaintiff's appeal, the Court of Appeals held that by reason of the narrow construction of the claim in the patent and of the prior art, there was not sufficient to exclude the method charged as an infringement, and affirmed the decree of the District Court, and apparently, or inferentially at least, found against the defendant on the question of the invalidity of the patent.

Complainant then filed a Petition for Certiorari to this court to review the action of the Court of Appeals

in holding that there was no infringement. The defendant, respondent, did not apply for a cross Petition for Certiorari. Although the defendant did not in this court urge, as an additional reason for sustaining the decision of the Circuit Court of Appeals, that the patent was invalid, this court said at l. c. 238-239:

> "In support of the judgment, the defendants might have urged the point as to the invalidity decided against them in the Circuit Court of Appeals without applying for cross Writ of Certiorari."

The case of *Commissioner of Internal Revenue* v. *Kelly's Estate*, 84 Fed. (2d) 958, decided by the Seventh Circuit Court of Appeals, which cites and follows the case of *Lagnes* v. *Green, supra,* perhaps most clearly sets out the doctrine enunciated by the cases just referred to. In that case a report had been made by the executor of the Kelly estate for inheritance tax purposes, in which he had listed as an asset a certain property known as the Roseland property of the value of $250,000, and in the same report he had taken as a deduction two notes, one for $24,000 and one for $150,000. The Commissioner of Internal Revenue denied the claim of the executor for deductions on account of the $24,000 note and the $150,000 note and assessed an estate tax of $3783.16.

The executor filed his petition for review before the Board of Tax Appeals and there was permitted by the Board of Tax Appeals to amend his original petition by alleging that, instead of the deceased owning a fee title to the Roseland property, which was listed as an asset, the decedent owned only a life estate which terminated

with his death, and hence could not be considered as an asset in assessing the estate tax. With this amendment, the Board of Tax Appeals held that the title of the deceased was only a life estate and not subject to an estate tax and that taking it from the list of assets presented an estate in which there was no tax deficiency.

The Internal Revenue Commissioner filed the usual necessary application in the Seventh Circuit Court of Appeals for a review of the decision of the Board of Tax Appeals on the question of title to the real estate. Before the Board of Tax Appeals apparently the question of the claim for deductions of $24,000 and $150,000 was not considered. The executor filed no application for an appeal from the finding of the Court of Tax Appeals, for although the finding had been against him on the question of the deduction of the $24,000 and the $150,000 items, the net result was a finding in his favor.

In the Circuit Court of Appeals, although he had taken no appeal, the executor contended that even if it should be determined that the ownership of the Roseland property was in fee and, consequently, that the property should be considered subject to the estate tax, such item should be offset by the deductions which the executor claimed and which the Commissioner should have allowed, but did not. Touching this question, the court says, l. c. 962:

> "In his brief the respondent contends that even though it should be determined that the Roseland property belonged to decedent in fee simple at the time of her death, and that it must, therefore, be included as a part of her gross estate, nevertheless

the decision of the Board that 'there was no deficiency in the estate tax' must be affirmed. This contention is based upon the theory that the Board erred in denying the deductions for the $24,000.00 and the $150,000.00 indebtednesses to which he contends in the brief the estate is entitled, and when these debts are deducted from the gross estate the decision of the Board is correct, even though the value of the Roseland property is included therein. These are the two items of indebtedness to which reference has heretofore been made deduction of which was denied by the Commissioner in his determination of the deficiency tax, in which determination he was sustained by the Board. No cross petition for the review of the adverse ruling of the Board upon these two propositions was filed by the respondent in this proceeding. His position is that no such petition is necessary to present the question of whether such debts should be deducted, in the event of adverse decision by this court upon the question of title to the Roseland property presented by petitioner in his petition for review. The Board's decision was that 'there is no deficiency in the estate tax;' therefore, respondent says he has the right to ask this court to review the action of the Board with respect to its disallowance of the deductions in an effort to sustain its final decision. This, he contends, is the duty of the court, whether presented by cross petition or not. It seems that respondent finds support for his position in the case of *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248-249, 97 L. Ed. 544, wherein the court said: 'Respondents seek to sustain this judgment upon that ground, and also upon the additional ground, which the lower court found against them, that there was no evidence of a conspiracy or combination to monopolize interstate trade. Because there was no cross petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the

judgment below, but to sustain it; and this they may do. *Lagnes* v. *Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520.'

It is extremely doubtful whether respondent had the right to file a cross petition in this proceeding, because he received, by virtue of the Board's decision all of the relief for which he asked; that is, there was no deficiency in the estate tax of decedent. He was not aggrieved by such decision, and, therefore, there was nothing upon which to ask a review. The Supreme Court, in the case of *Corning, et al.* v. *Troy Iron & Nail Factory*, 15 How. (56 U. S.), 451, 465, 14 L. Ed. 768, said: 'The court were not bound to give any reasons for their decree. The law gives the party aggrieved an appeal from a final decision of an inferior court. But it does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reason, or recited insufficient ones for a judgment.'"

See *Guarantee Co. of North America* v. *Phoenix Ins. Co.*, 124 F. 170 (C.C.A. 8); *Harding* v. *Federal National Bank* (C.C.A.) 31 F 914.

"In deciding whether or not there is a deficiency in decedent's estate tax, the Board of Tax Appeals had several questions to determine. It required a determination of each of these questions before it could arrive at its final conclusion, and each question was considered separately by it, as shown by its written opinion. After each question had been considered and determined, it then arrived at its final decision, based upon its answer to each of the questions presented, that there was no deficiency tax due. From this final decision and from this alone, the Commissioner filed his petitioner for a review of this court. True, the errors assigned relate wholly to the question of the title to the Roseland property; that is, whether the decedent was owner thereof in fee simple, or whether she was the owner of only a life estate therein. This court having decided that ques-

> tion in favor of the petitioner, the question yet remains whether or not the Board erred in its final decision that there is not tax due. That question can only be determined by a consideration of the correctness of the Board's ruling that the respondent is entitled to no deduction for the two items of indebtedness heretofore mentioned."

In the case of *Erwin* v. *Lowry*, 48 U. S. 172, the court states the doctrine as follows:

> "This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound enough, even though the District Judge may have rejected that reason and rested his decree on some other ground."

This case is cited with approval in the case of *Dean* v. *Davis*, 212 Fed. 88, l. c. 89, where the quotation just cited is adopted and set out in the opinion of the court.

In the case of *Mound City* v. *Castleman*, 187 Fed. 921, l. c. 923, Judge Walter Sanborn of the Circuit Court of Appeals for the Eighth Circuit, states the principle thus:

> "The proceedings in this suit have been many and tedious. An original bill, two supplemental bills of pleas, answers, exceptions to answers and numerous rulings in the progress of the case have presented numerous favorable opportunities for alleged errors, which counsel for appellant has not failed in his assignments to specify and take every possible advantage of, but an appeal in a suit in equity invokes a trial of the case *de novo* by the appellate court and demands, where that is possible, a just and final decision. When, therefore, the record clearly shows that the decision below was right and that alleged errors, if they existed, could not affect adversely to the appellant to the final result, the decree must be affirmed."

II.

Respondent Was Entitled to Specific Performance.

The district judge granted the relief prayed for in respondent's petition on the one ground of exoneration. He could and should have granted it also on the ground that respondent was entitled to have the contract of April 28, 1933, specifically performed. The district judge excluded the ground of specific performance for the stated reasons (page 124, Transcript), that "the plaintiff did not itself discharge all its obligations under that agreement" and because as petitioner never received the final payment due from the United States it could not comply with a decree of specific performance and, hence, specific performance was impossible. The district judge was wrong in both these conclusions.

As to the first: The doctrine of specific performance is the right of a court of equity to compel the performance of a contract, where under all the circumstances it is just and equitable that it do so, and where no adequate remedy at law is afforded the moving party to the contract.

Generally the party seeking performance must have performed the contract on his part, because it would not be equitable to enforce one party to specifically and fully perform the contract on his part at the request of a party who had not himself performed. The object sought is to see that the purpose of the contract is consummated, that what is sought to be accomplished is accomplished. Full performance literally is not required, and the contract may be

specifically enforced by one party who has substantially performed it on his part. What is meant by substantial performance is for a court of equity to say, but generally means such performance as permits and accomplishes the purpose of the contract, and not such delinquency as retards or prevents its fulfillment. It does not mean the contract may not be enforced when the party seeking to enforce it has in some unimportant detail failed of performance; or where both parties have omitted to perform some unimportant detail, some detail not preventative or prohibitive of the consummation of the contract, particularly if such delinquency by each party is a similar delinquency; or where by mutual consent or acquiescence some detail is abandoned or not insisted upon. This contract (page 10, Transcript), was entered into for a definite purpose, and that was to make possible the completion of the contract for which petitioner was obligated, and to assure which respondent executed the surety bond. Both were interested in seeing that the contract was completed and neither wanted to suffer a loss. The letter leading to the making of the contract (page 12, Transcript), shows that petitioner, without assistance, was unable to proceed, and was soliciting from its surety such assistance as would make it possible to complete the contract. Petitioner recognized that this obligation was its own and that it would have to reimburse respondent for any money advanced for such purpose. It was intended that only such advancements as were necessary were to be made, and necessarily meant that no advancements should be made for the personal use of petitioner, or more than were

necessary to effect the purpose of the contract, that is, its completion.

There were unquestioned labor bills then due and those had to be paid in order for the work to go forward. For those needs, immediate advancements were necessary and were made. There were other labor bills, which if proven correct, were due. These, if determined to be correct, would have to be paid by advancement as there was no available fund out of which they could be paid. These were determined to be correct and an advancement made to pay them. The first items were paid by the respective advancements of $5,000.00 made by each party at the signing of the contract. The latter items were paid by the advancement of $5700.00 later made by respondent. By these advancements, all accrued obligations, which might delay the contract, were paid.

It apparently was in the minds of the parties that more money than the current estimates would supply might be necessary to keep the work going. So it was provided in the contract that the petitioner would "deposit from time to time certain other sums of money to be used toward the completion of said contract" (page 10, Transcript), and that respondent would in addition to the deposit of $5,000.00 necessary to care for the acknowledged due labor claims, deposit additional moneys to pay the unpaid disputed labor claims, and would deposit "also sufficient money to complete the Giamberardino & Sons contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory." Petitioner did not, thereafter, "deposit from time to time certain other sums of money to be used toward the

completion of said contract." This, of course, meant other moneys than that derived from the contract for other provisions were made for the deposit of the payments made on the contract. That this was the meaning of such statement is indicated by the letter leading to the contract, where petitioner states that if the specific assistance then required was furnished, the petitioner's bank would advance the money to complete the contract (page 13, Transcript). We think no other interpretation can be given of this obligation than that if the current estimates were not sufficient to keep the work progressing, the petitioner through its bank's help, would furnish the money to do so.

Respondent did not thereafter, in addition to the $10,700.00 advanced by it, deposit "also sufficient money to complete the Giamberardino plastering contract." This, by the same course of reasoning, applied to petitioner's obligation, meant that such money would be advanced as was necessary to complete such contract if it was necessary in addition to the current estimate, to keep the contract going. No specific amount was mentioned, and no specific time of payment was fixed in either instance. Only sufficient to complete the contract. The contract was completed with the current payments on the contract, without either making further advancements. So far as the record shows, no delay or disadvantage was occasioned to either party by such failure. The purpose of the contract was accomplished without such advancements. The contract was clearly substantially performed by respondent. The failure, if a failure it was, was immaterial in view of all the circumstances, and was only

such failure as petitioner itself committed. The real purpose of the contract was to make available, to assure respondent that all the moneys thereafter received from the contract would be available, not only for the completion of the contract, but also for the payment of bills for labor performed and materials used in the construction of the buildings. And now, after the purpose for which the obligated payments were to be available has been accomplished without such advancements being made, it would be highly inequitable to refuse the performance of the real purpose of the contract.

The petitioner, having defaulted in the same particular, cannot be heard to complain of default of respondent. However, in addition to all that has been said, the petitioner acquiesced in such failure, if failure it was. As stated, the real purpose of the contract was the deposit in escrow of the payments, and after the charged default of respondent, petitioner continued to send for deposit in accordance with the contract, all subsequent estimates, until the final payment. And only when it is sought to enforce such contract by action is the question of performance by respondent raised. Such acquiescence is further demonstrated by the evidence offered or brought out by petitioner in support of its defense of non-performance. This evidence appears in the testimony of H. F. Morley, the president of petitioner, and of James F. Kelly, respondent's local representative. Morley, petitioner's president, was offered by respondent as a witness. On cross examination, he testified that when the first month's work was done by the plaster contractor, who had taken over the Giamberardino con-

tract, he requested Kelly, representing respondent on the work, to give him the money to make payment, and that Kelly advised him to pay it out of the funds in the joint account (page 81, Transcript). So far as the record shows, Morley did not demur to this. When next month's payment came due and request was made to Kelly that the money be advanced, Kelly again suggested that it be paid out of the joint account and the same thing occurred at the third month (page 81, Transcript). And neither time did Morley demur or make demand, and each time paid it out of the joint funds and on neither occasion was the work stopped or delayed. Morley testified shortly thereafter Kelly told him respondent was not going to put any more money in the account. There is nothing in the record to show that Morley demurred to this suggestion or to show that such action of respondent delayed or prevented the completion of the work. Morley never made any further demand upon Kelly for advancement (page 81, Transcript) and the work progressed to completion without delay by the use of current estimates and without the necessity of any advancement by either petitioner or respondent.

Kelly testified (page 91, Transcript) that when an estimate became due, he asked Morley if he was going to pay that part of the plasterer's contract out of the estimate as had been understood, and that Morley did so. That Morley did not ask him to pay the plasterer's estimate and witness told Morley to pay the plasterer's estimates out of the estimates coming due. Clearly this testimony shows such mutual action and acquiescence as would constitute what was done, a substantial performance

by respondent, with acquiescence by petitioner in respondent's action.

Acquiescence by petitioner in the modification of the contract of April 28, 1933, or in the deviation from it, which was afterwards carried out, deprives the conduct of respondent of any taint of inequity.

Becker v. *Becker*, 250 Ill. 117, 95 N. E. 70.

In discussing the right to specific performance, the court in *Shubert* v. *Woodward*, 167 Fed. 47, said, l. c. 54:

> "The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules and practice of equity jurisprudence. *Hennessey* v. *Woolworth*, 128 U. S. 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience, and by them the judicial discretion of the court must be guided."

In distinguishing between what will and what will not preclude relief of specific performance, the Circuit Court of Appeals, with the comments that in the instant case relief of specific performance can be granted without violence to the stated rule, refers to the case of *Michigan Pipe Company* v. *Fremont Ditch, Pipe Line & Reservoir Co.*, 111 Fed. 284 (C.C.A. 8), where it is stated:

> "A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning

> which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit."

Petitioner in its answer alleges failure of respondent to make the additional deposit required by the contract (for the completion of the Giamberardino contract) and says "and for said reason the said contract was broken by said plaintiff to the great damage of the defendant, Morley Construction Company." In connection with this allegation, after referring to the testimony of Morley (page 81, Transcript) and Kelly (page 91, Transcript) the Circuit Court of Appeals makes this applicable comment on the circumstances surrounding the transaction:

> "But other considerations must be kept in mind. The Morley Construction Company was insolvent. The contract, Exhibit 'A,' was entered into for the purpose of extricating the defendant, Morley Construction Company, from financial difficulties in connection with the construction contract, and for completing the construction contract. This was the purpose of establishing the joint account provided for in Exhibit 'A.' This purpose was accomplished. The construction contract was completed to the satisfaction of the United States Government, and final payment ordered."

As showing that no violence had been done to the contract or its completion affected by the alleged breach of respondent, it appeared that after the completion of the work, there still remained in the joint account without

which the work had been completed, the sum of $7900.00. This amount was accumulated by Morley, after carrying on the work (pages 83-84, Transcript) and was available and should have been used, if necessary, before either petitioner or respondent should have been required to make any further advancements.

In *Fitzgerald* v. *Remick*, 43 Ia. 498, the question was whether or not the party seeking to enforce the contract by a railroad company, had complied with the contract upon its part when it had located its railroad station at a place and in a manner different from, but substantially as provided in the contract. The court says:

> "Hold: then, that the parties, in fixing the location, intended that the depot should be on five acres in the form of a square on the north or west of the land in dispute, and as in such form it could not join along the whole line, our conclusion is that there has been a substantial compliance with the contract, and this is all that is required."

In *Work* v. *Welsh*, 43 N. E. 719, 160 Ill. 468, an action was brought to specifically enforce a contract for the conveyance of certain land. The condition of the contract required that before such conveyance should be required, the corporation to whom the conveyance was to be made should be organized with a capital stock of $100,000.00 and that the corporation as organized should build a certain factory building on the land, which no doubt enhanced the value of the adjoining property owned by the other party to the contract. The stock was not all subscribed and objection was made that the

furniture company had not fully performed its part of the contract. The court said:

> "It is perhaps true, as suggested, that had all the subscriptions to the capital stock of this company been fully paid, it would not have been overcome by financial reverses. Haegg was himself a subscriber to the amount of $5,000.00 and paid no part thereof. (Haegg was one of the parties to the contract for the conveyance of the land.) Appellant standing in his position and with no greater equitable or legal rights, cannot with good grace ask this court to work a forfeiture of all this property and give him the benefit thereof for the failure to fulfill a condition which appellant's grantee had himself broken. The Circuit Court on a hearing of testimony, partly oral, found that there had been a substantial compliance on the part of the Peoples Mantle & Furniture Company of the conditions with this purpose. Such a compliance as this was satisfactory to the Haeggs and to such an extent that neither they nor their successors or assigns have any right to deny any such fulfillment or compliance. We hold there was no error in the rendition of this decree. From our view of the case, no other decree would have been in accord with equity and good conscience."

In the case of *Van Dyke* v. *Cole*, 70 Atl. 593, 81 Vt. 379, in an action for specific performance, the defendants alleged by way of defense, that the plaintiff in violation of the contract had cut certain timber from the land. After discussing the facts and commenting on the comparatively small value of the timber cut, the court said:

> "In these circumstances, specific performance should be decreed, for thereby the orators will receive justice by way of full compensation while a denial of such relief would leave the defendant without any adequate remedy on his contract, and result in great hardship and injustice to him."

In the *City of LaFollette* v. *LaFollette Water, Light & Telephone Company,* 252 Fed. 762, an action was brought by the defendant, an utility company, to enforce the specific performance of a contract made with the city. The city in defense, set up that the utility company had not fully performed in all details the contract as to the furnishing of certain lights and other insignificant parts of the contract. The United States Circuit Court of Appeals for the Sixth Circuit, recognizing that a substantial performance of the contract was all that was necessary states, l. c. 768:

> "The question as to whether the plaintiff has substantially performed the contract on its part so as to now entitle it to a decree of specific performance presents greater difficulty."

Again quoting from the opinion of the district judge, whose decision was affirmed, the opinion states:

> "And I am of opinion that a substantial performance of that portion of the contract relating to private service to consumers with its implied terms, is essential in order to entitle the plaintiff to a decree against the city for specific performance of that portion of the contract relating to public service, as well as substantial performance of those provisions of the contract relating to public service."

In the case of *Taylor* v. *Longworth,* 14 Peters 172, this court in discussing this question says:

> "In the first place, there is no doubt that time may be the essence of the contract for the sale of property. It may be made so by the express stipulations of the parties, or it may rise by implication from the very nature of the property or the avowed objects of the seller or purchaser, and even when

time is not thus either expressedly or impliedly the essence of the contract, if a party seeking a specific performance has been guilty of gross laches or has been inexcusably negligent in performing the contract on his part, affecting the rights, interest or obligations of the parties; in all such cases, courts of equity will refuse to decree any specific performance on the ground that it would be inequitable and unjust.

"But, under circumstances of this sort, or of an analogous nature, time is not treated by the courts of equity as the essence of the contract; and relief will be decreed to the party who seeks it if he has not been grossly negligent and has come within a reasonable time, although he had not complied with the strict terms of the contract."

In the case of *Shaw* v. *Livermore*, Vol. II, Greene's Reports (Ia.) 338, in discussing this question, the court says:

"It is urged that complainants are not entitled to a specific performance, because Dutton had not performed his part of the agreement. But we think this objection is not maintained by the facts as they appear in the bill, answer and depositions. They disclose no serious default on the part of Dutton. He appears to have acted in good faith and to have taken all necessary steps towards a substantial compliance with the terms of the agreement. He appears to have built a house and the fence upon the lot as stipulated; to have tendered the money and demanded a deed, and to have resided upon the premises as a carpenter and joiner for nearly two years before he sold his interest to Livermore, and it is not pretended that these things were not done within a reasonable time. At least, the important conditions which would entitle him to a deed from Shaw appear to have been performed with ordinary diligence. If

> the facts in this case had indicated gross laches or inexcusable negligence in performing the conditions of the contract on the part of the complainant or if, after the inception of the agreement, and the refusal of the respondent to execute the deed, those facts had shown a material charge affecting the rights and obligations of the parties, the broad, equitable and just rules of chancery jurisprudence would be violated by enforcing a specific performance of the contract. But on the other hand, this court will extend relief to the party who seeks it, even if there has not been a strict legal compliance with the terms of the contract, where such non-compliance does not affect the essence of the agreement, does no violence to the manifest intention of the parties, nor shows gross negligence in the complainant. 2 Story's Eq. Jr., Secs. 771-776-777; *Taylor* v. *Longworth*, 14 Peters 172, 175."

In *Bell* v. *Warren*, 39 Tex. 106, l. c. 110, the court says:

> "The case referred to does not assume a doctrine different from that which we propose to lay down in this case, and yet we hold that if York in his lifetime, did so far execute the trust, in the selection of the land and procuring its location, that any person could have advanced the money and lifted the patent, and done any other such act as could be done by one person as well as another, then the contract was substantially complied with and equity will enforce its performance."

The District Court was wrong in his conclusion that specific performance was impossible. This was an action *in personam*. The United States Government was making no claim to any part of the fund represented by the warrant, and absent the restraint imposed upon it by the proceeding brought by respondent in Washington, would turn over and pay the warrant. Certainly by the

joint action of petitioner and respondent, the fund could be immediately made available. Both petitioner and respondent are in court, subject to the court's orders, and could be made to do such things as would make the fund available for the purposes for which specific performance was sought. The Circuit Court of Appeals, we think, correctly answers this objection, as follows (page 135, Transcript), *Morley Const. Co.* v. *Maryland*, 84 Fed. (2) 522:

> "Nor do we think a decree for specific performance of the contract, Exhibit 'A,' is impossible of being carried out. A court of equity should mould its decree to meet the exigencies of the situation. What the plaintiff is seeking by its present complaint is to have the moneys still coming to defendant under the construction contract applied to payment of bills for labor and materials furnished for the completion of the construction. The circumstances appearing in the record warrant such an application. That such moneys come within the provisions of the contract, Exhibit 'A,' we think too clear for argument. An injunction against using the moneys except as agreed upon, and an order to place said moneys when received in the joint account and disburse the same in payment of just claims for labor or materials, would meet the requirements and rights of plaintiff and would not be impossible of performance."

It would seem from these authorities and from any equitable consideration of the situation that when all of the material portion of the contract had been performed, and when the object for which it was given had been accomplished, that respondent was entitled to have the substantial portion of the contract specifically enforced and that the district judge should have decreed specific performance of the contract.

What we have here said under paragraph II of this argument is in answer to paragraph II, page 26 of petitioner's brief, and paragraph III on page 31 of the same brief, which are both directed to the same legal proposition.

III.

The contract of April 28, 1933, Exhibit "A," was the original and existing contract covering the deposit in the M. & T. Trust Company.

Under Section IV on page 34 of its brief, petitioner apparently is attempting to state that the contract, Exhibit "A," was superseded by some other contract and superseded by the substitution of H. F. Morley in the place of the Morley Construction Company in the joint account. Exhibit "A" (page 10, Transcript) was the original contract. After its execution, it became necessary to notify the M. & T. Trust Company of the terms of this contract, and there was prepared a contract to the same purpose which served as a direction or notification to the M. & T. Trust Company of the execution of the prior contract and embodied in it the directions and conditions upon which the M. & T. Trust Company was to permit the withdrawals from this joint account. This is shown as Defendant's Exhibit 3 (page 77 of the Transcript), a reading of which readily shows it simply to be a direction to the M. & T. Trust Company as to the manner of distribution under contract, Exhibit "A."

The substitution of the name of H. F. Morley in the joint account on June 23, 1933, in no wise affects the con-

tract. It was simply made for the convenience of the Morley Construction Company and did not in anywise change the original agreement.

IV.

The contract of April 28, 1933, did not constitute an assignment in violation of Section 203, Title 31, U.S.C.A.

In paragraph V on page 35 of the petitioner's brief, the statement is made by petitioner that the contract of April 28, 1933, Exhibit "A," was an assignment or an attempt to assign the claim of the Morley Construction Company against the Government, and that by reason of the prohibition against the assignment contained in Section 203, Title 31, U.S.C.A., the contract was void. This contract in no sense purports to be, nor is it an assignment of the proceeds in the contract. It is simply an agreement by which the petitioner agrees that when he receives from the Government the payments under the contract, that he will deposit them in the joint account in Buffalo. The case cited under that paragraph is in no wise in point in the instant case.

V.

The statement made in paragraph VI on page 38 of petitioner's brief attempts to state a substantial breach by respondent of the contract of April 28, 1933. We have heretofore thoroughly discussed the alleged breach of the contract in Section II of this argument.

VI.

Under paragraph VII of the petitioner's brief, on page 39, the statement is made by petitioner that respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials, since the check or warrant was received in the ordinary course of a contractor's business, and constituted a part of its resources of executing contract to the United States, and follows this statement with the statement that a statute prohibiting our assigning claims against the Government, denies such right of respondent.

It is not necessary in order to give the relief requested here to impress this fund with a trust. It was not sought in anywise in this proceeding to bind the Government. It was simply sought to so establish this fund as to assure its use in the payment of bills for labor and material, and by whatever name it might be called, the court had the right to make such order directed to the petitioner as it saw fit, whether the effect of the same was to impress the fund with a trust or simply a direction to the petitioner to see that the fund was used for the purposes agreed upon, and for purposes to which the respondent was entitled to have it applied. The case referred to under this section does not in anywise deny this right.

VII.

Respondent was entitled to exoneration by its principal, the petitioner, out of the funds resulting from the construction work covered by the contract, to assure which respondent executed the performance bond.

The United States Circuit Court of Appeals was wrong in its suggestion that the right of exoneration did

not lie because the period of six months, within which the Government had the prior right to resort to the bond, had not expired, and because the time within which labor and material claimants might file their actions had not yet arrived when the suit was filed. The obligation of respondent to pay labor and material claimants was consummate as soon as the contracts for such labor and materials were made and the work under the same finished. Its liability was then established and the debt was then created. The mere fact that the time for filing suit was delayed did not in anywise change this fact that the respondent was obligated to the labor and material claimants before the time for the bringing of the suit arrived. The benefits of exoneration in all probability would have been defeated had respondent been required to await the bringing of its action of exoneration until the expiration of the six months' period, for the petitioner could and probably would have disposed of the proceeds of this warrant, or a portion thereof, and have put it beyond the right of any court to cause such proceeds to be used in exoneration of respondent.

Exoneration in this case is the right of the surety to have the principal use all funds derived from the contract which the surety guaranteed to be used in payment of the obligations under the contract and under the bond.

The District Court, in its memorandum opinion, sets out its findings of fact, in which it finds that on or about April 27, 1933, the Morley Construction Company became involved in financial difficulties and was unable to proceed with its contract without pecuniary aid from the Maryland Casualty Company (page 120, Transcript of

the Record). The court further found that on or about that date the agreement of April 28, 1933, was entered into, under which it was agreed that all moneys and estimates thereafter received should be deposited in the joint account, it being intended and understood that it was a part of the agreement that the moneys to be so deposited should include the final payment under the contract made by the United States, as well as all other payments made under the contract by the United States (page 117, Transcript of the Record). The court further found that there was due from the United States Government the sum of $59,780.82, and found that, notwithstanding the fact that under the agreement all moneys were to be sent to the M. & T. Trust Company at Buffalo, the Morley Construction Company, contrary to the agreement, had directed the United States Government to send the warrant representing this last payment to it at Kansas City, and not to the M. & T. Trust Company, as the other warrants had been sent after the agreement was entered into (page 117, Transcript of the Record). The court found that at the time of the agreement of April 28, 1933, the Morley Construction Company was insolvent and found that it was insolvent when the bill in the present case was filed (page 123, Transcript of the Record). The court further found that when the bill in this case was filed there were claims against the Morley Construction Company for labor and material furnished on the Batavia contract in an amount exceeding $100,000, which were due and payable, and that the time at which suits might be independently filed against the Casualty Company, as surety, had not yet arrived when the bill was filed. The court then found that, while it was not

the intention of the Morley Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant for any purpose other than the payment of labor, materials and claims on the Batavia contract, the Casualty Company had reason to apprehend that such was their intention (page 123, Transcript of the Record). We might say here, by way of interpolation, that the court in this statement that the Morley Construction Company did not intend to use the proceeds of this warranty for any other purpose than the payment of the labor and material claims, apparently has overlooked the position of the Morley Construction Company, as stated by its counsel during the trial of the case shown on page 112, Transcript of the Record, which is as follows:

> "Q. However, Your Honor, since he has stated what they are willing to do, we offer to deposit this money in the First National Bank here or any other bank, together with a list of all the bills payable on this job, with instructions on the bank that no check should be paid except in the reduction or settlement of one of those bills, and the further provision that any expenses of prosecuting these claims against defaulting contractors or the government should also be paid from this fund.
>
> Mr. Harris: Subject to our supervision.
>
> Mr. Ellison: We object to the joint control."

It is perfectly apparent from this statement what was the reason why the Morley Construction Company diverted this check by its direction to the United States government to send it to them in Kansas City and why, after it was discovered that they had done so, they refused to then have the check sent and disbursed as all of

the other moneys had been under the joint account to the payment of bills for labor and material. It is perfectly apparent that it was their intention that they should assume complete and sole control of the funds to be disbursed by them without any supervision or control by the Maryland Casualty Company, and that they intended to use the same in the payment of counsel fees and expenses in attempting to prosecute their alleged claims against alleged defaulting sub-contractors to any amount which they might desire and to an extent that would necessarily diminish the funds available for the payment of labor and material claims, which, perhaps, explains the reason for the defense in this action.

The District Court on its findings held that the plaintiff was entitled to exoneration by the defendant and that when the bill was filed the claims against defendant, Morley Construction Company, of those who had furnished labor and materials on the Batavia contract in the amount of more than $100,000 had matured and were due and payable, and that immediately this became true the liability of the Maryland Casualty Company arose, and contemporaneously with its liability, its right to exoneration in equity came into being, quoting from Ruling Case Law the statement:

> "No principle in equity is more familiar or more firmly established than that a surety, after the debt for which he is liable has become due, without paying or being called upon to pay it, may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability by its payment" (page 124, Transcript of the Record).

The District Court in its findings comments upon the position taken by counsel for the Morley Construction Company that, inasmuch as the labor and material claimants could not sue the Surety Company until the expiration of six months, therefore, the Maryland Casualty Company's right of exoneration, which they admitted, did not come into being until the expiration of the six months' period, which was subsequent to the date of the filing of the bill. The court in its further finding and in answer to that contention and running back to its quotation from 21 R. C. L. 146, found:

> "* * * But under the rule stated, the right to exonerate begins when liability begins. The cited statute in effect provides that the surety's liability shall begin when the principal fails promptly to pay those furnishing labor and materials.
>
> The plaintiff then is entitled to a decree requiring the defendant to pay all labor and material claims arising in connection with the Batavia contract for which the plaintiff is liable under its bond and to apply to such payment any money it has or will realize from assets now possessed by it, including its claim against the United States on account of that contract" (page 124, Transcript of Record).

On these findings of fact the court entered the decree of exoneration which is shown on page 37 of the Transcript of the Record.

The issue of law thus presented is clear and simple. The defendant concedes the theory of the doctrine of exoneration as we see it, and the court found that they had conceded that under the conditions obtaining, the Maryland Casualty Company would be entitled to exoneration, except that they say although the right of

exoneration existed, it could not be enforced until the time came when the claimants for labor and material could actually bring suit against the Maryland Casualty Company on the bond. So, the issue is whether, as a matter of law, the right to enforce the Maryland Casualty Company's right of exoneration began when the obligations, for which it was liable, were due and payable by the Morley Construction Company, which had incurred the bills, or whether such right did not begin until such time as the labor and material claimants might have sued not only the Morley Construction Company, but the Maryland Casualty Company.

There is no question raised but that the right to enforce such obligations by the labor and material claimants, as against Morley Construction Company, existed at the time this bill was filed. The building was completed about July 9, 1933, and the whole work accepted November 9, 1933 (Tr. 18). So that all of the material for which claims were being made had been installed in the building prior to July 9, 1933, and all the labor, excepting the grading of the grounds, had been performed prior to July 9, 1933. Any claimant, in the absence of a contract to the contrary, which does not appear, could have brought suit against the Morley Construction Company, irrespective of the Heard Act, upon or after the delivery of the materials or performance of their work. So that there is no question but that, as to the Morley Construction Company, not only the liability but the right to enforce the liability, existed long prior to the time the bill was filed. So, the only question that remains is, whether or not the liability of the Mary-

land Casualty Company had accrued so that its right to be exonerated had come into being.

Perhaps it might be well at this time to examine the situation with reference to the right existing in the Government for the first six months following the completion of the contract to sue upon the bond. The bond, under the Heard Act, is given, primarily, to assure the Government of the completion of the work and, secondarily, to assure the persons furnishing labor and material on the work the payment of their bills to the extent of the bond, providing the penalty thereof is not consumed by the Government in the event of the failure of the contractor to perform his contract. Although we do not concede that the right to exoneration would not begin until after the Government's claim, if any, for failure to perform the contract had been satisfied, we may do so for the sake of the argument. Assuming such to be the effect, it at once appears from the record that the Government not only had not asserted, but did not have any right of action or recourse on the bond. It appears beyond question that on or about November 9, 1933, the Government accepted the building and the work as completed and acknowledged the performance of the contract by the Morley Construction Company and issued to the Morley Construction Company its check for the final payment. So that, although the right to sue for the first six months was given to the Government, it appears at the time the bill was filed that the Government had no right to sue, because it had accepted the work as complete in accordance with the contract and had issued its payment for the same. The restriction on the rights to sue

is not effective in all instances. If the United States should on the next day after the completion of the work file suit on the bond the materialmen could at once intervene in such suit and establish their rights of recovery before the expiration of the six months' period. So clearly the liability accrued prior to the expiration of the six months' period.

The controversy arises over the contention of petitioner that the right of exoneration of the respondent did not arise until after the right to sue it had accrued, and not upon the accrual of the liability. In support of this contention appellant has cited cases in which it is held that the right of exoneration comes into being when the debt for which the surety has obligated itself becomes due, and cites and quotes from cases which hold that the right of the surety to exoneration does not come into being until the debt for which it has obligated itself becomes due. These very words are used in the opinions, but an examination will show that in each such case the debt is not due from the principal and, therefore, of necessity, is not due from the surety. The words are used in connection with the facts in each particular case. There is no case which presents the facts which are here presented. The cases to which petitioners refer the court are cases by endorsers of notes who became fearful of their obligation and sought to require the maker, whose payment they guaranteed, to exonerate them before the note itself became due by the principal, which, of course, is not the reason for the right of exoneration. A liability in one sense always accrues immediately upon the signing by a surety or an endorser. The exact minute

the endorser of a note signs, he accepts a liability and the very minute a surety signs a bond for the payment of a contract or the payment for labor and material, it accepts a liability which may or may not ripen into an obligation. The liability becomes fixed when the obligation of the principal matures, and when the obligation of the principal matures the liability of the surety accrues, the amount thereof only to be determined upon the enforcement of the obligation.

Practically all burglary policies of insurance and many obligations for life benefits and for disability benefits provide that no suit shall be brought for a period of thirty or sixty days, or longer, but the liability ripens into an obligation when the loss occurs under the policy, and in this case the liability which accrued immediately upon the signing of the bond ripens into an obligation when the material or labor, for the payment of which the surety gives its assurance, becomes a matured obligation on the part of the principal, even though the right to enforce it against the surety is postponed for one or another reason. If it had happened that the Government had made a claim that the contractor had not performed his contract, by reason of which the Government brought a suit upon the bond, this could not affect the liability of the surety company. Such an action by the Government might be brought within six months, and might not be finally determined for years, but the obligation or liability of the surety company would not be deferred until after the final determination of the action brought by the Government, which, as we say, might be years. The only thing that is deferred is the determination of

the amount for which the surety company might be liable to the claimants for labor and material, which could only be determined after the suit of the Government had been terminated so that it could be determined whether or not the Government consumed the full penalty of the bond, and, if not, to what extent. The only thing that would be deferred would be, not the right of the materialmen against the surety on the bond, but the amount which they might be able to recover, dependent upon the extent to which the Government's action had consumed the penalty of the bond.

In order to get the legal principle as fixed by the commentators on the law, we desire to quote more fully from the paragraph quoted by Judge Otis in his findings.

In 21 Ruling Case Law, paragraph 146, on pages 1110 and 1111, the law, including that stated by Judge Otis, is set out as follows:

> "No principle in equity is more familiar or more firmly established than that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby * * * The right of the surety thus to be exonerated from liability is founded on equitable principles—the *prima facie* duty of the principal to pay the debt, the fact that it is unreasonable that the surety should be burdened with liability and should have a cloud always hanging over him at the will of the creditor even though he is not molested for the debt, and the risk of ultimate loss. A surety may apply to a court of equity for protection as

soon as he is in danger and upon a bill by the surety to compel the payment of the debt by the principal without notice to the creditor of the surety nor an allegation of irreparable injury, if the surety is compelled to pay the debt, constitutes an essential element of the surety's right to equitable relief, and a bill by the surety to compel the principal to pay the debt need not allege an attempt by the creditor to enforce such liability against the plaintiff."

In the case of *Southwestern Surety Co.* v. *Wells*, 217 Fed. 294, being a decision of a district court in Pennsylvania, the facts are not set out or discussed. It appears from the opinion that two bonds were given, upon both of which the complainant was surety. One was for completion of the work and one was for the payment for labor and material. The work was not completed; that is, at the time of the filing of the bill it would appear that the contractor was still in the performance of the job, although the time for completion had elapsed. The court apparently held that inasmuch as the job had not yet been completed, the amount of the *per diem* penalty had not accrued and as to such bond the complainant was not entitled to exoneration, which would appear to be a correct holding, as the obligation could not be determined until the completion of the work. The other bond was for the payment of labor and material. There is nothing in the opinion to indicate whether there was any time within which the labor and material claimants could or could not sue, but it is apparent that the amount of material and labor bills or claims for which the complainant was seeking exoneration was determined, and the court held in that case that as to the bond covering

the payment of labor and material bills, the complainant was entitled to exoneration. The condition in the material and labor bond, no doubt, was that the principal should pay all bills for labor and material, and the court says, l. c. 295:

> "This equitable doctrine of exoneration is analogous to, at least is often coupled with, the legal principle which permits the obligee in an indemnity bond to maintain his action as soon as the claim was made. He need not await the beginning of an action against him. He may stand on default in the condition to save him from the harassment, claims and demands."

The condition on the default of which he may stand is the condition that the principal will pay the claims and demands. The principal is not obligated to pay claims and demands until they are due against him, but when they become due and he does not pay them, there then arises a default in the condition, which, according to this authority, gives rise to the right of exoneration by the surety. Unquestionably, all of the claims as shown by the exhibit opposite page 88 of the Transcript of the Record were due by the Morley Construction Company, as they are listed as obligations of the company. The failure to pay them clearly was a breach of the condition of the bond.

The doctrine of exoneration in itself is too firmly recognized to require the citation of any authorities and it is only necessary to apply the known principles to the facts involved. The primary purpose, of course, is to protect the surety as against his principal and to require the principal to pay the obligation which is

primarily his, but which the surety has guaranteed. The question of the maturity of the debt is involved and where there are creditors whose rights are adverse to those of the surety, the question has arisen as to the necessity for the making of such creditors parties to the action. But where there are no creditors asserting any interest adverse to the rights claimed by the surety; that is, where there are no creditors other than those for whose benefit the surety is seeking to apply by way of exoneration certain funds arising out of the contract, the necessity for the making of the creditors parties, does not arise and the creditors are not necessary parties. The question of the necessity for creditors as parties will be hereafter discussed.

One of the late cases decided by the 5th Circuit Court of Appeals, 1932, is that of *Glades County* v. *Detroit Fidelity Company,* 57 Fed. (2) 449. In that case the contractor had made an agreement to construct a court house, and for the performance of the contract and for the payment of labor and material bills, gave to the county its bond with the Detroit company as surety. The contractor completed the contract, but left a number of unpaid bills. There still remained in the hands of the county part of the contract price. The contractor became bankrupt and a trustee in bankruptcy was appointed. The surety company filed its bill in equity to require that the money remaining on the unpaid contract price should be paid and disbursed to materialmen in exoneration of the surety company's obligation on its bond. No other persons were parties to this bill. The court in sustaining

the right of the surety company to have this fund disbursed in exoneration of its liability, says, l. c. 451:

> "The bond exhibited by the bill is conditioned that the contractor shall fulfill its contract with the county 'and shall fully and promptly pay the wages of all laborers, workmen and mechanics employed by it or its sub-contractors on said work, and shall fully and promptly pay the claims of all persons who furnish materials and supplies used in the construction of said building.' The bond is plainly given under the statute and to be construed in the light of it. It operates as a security to the county for the performance of the contract, and also as a security to the laborers and materialmen for their payment, and in this sense embraces two bonds. . . . In its second alternative aspect, the bill, in case its defense of breach by the county fails, acknowledges liability to the materialmen and professes a willingness to pay them; but sets up the bankruptcy of the contractor, and that the trustee in bankruptcy insists that what is due by the county on the contract is general funds in bankruptcy not specially applicable to the claims of the materialmen, and is suing the county in a state court to collect and so apply them; that the surety is about to have to pay the materialmen, but in equity is entitled to exoneration by use of the sum due from the county; and it seeks an account of the same and an application of it to the materialmen's claims, the surety to be held only for the balance. In this aspect the bill has equity. We are now dealing with the surety's obligation to the materialmen only. The principal has failed to discharge his obligation when due, is insolvent, and his representative in effect refuses to discharge it. As between the surety and the principal there arises without payment by the surety and without his having even been sued, an equity of exoneration. . . . In case of exoneration he proceeds before payment *quia timet*, and seeks to have payment made to the

creditor. If the principal is solvent, the decree need not go further than to require the principal to pay, but, when he is fraudulent, insolvent, or has absconded, the equity of exoneration needs and may have further protection. Injunctions, receivers and equitable garnishments have been granted, property recovered from third parties, and funds traced and applied. . . . Assuredly equity will require to be applied to the obligation a fund which by the very contract of suretyship stands as a security for performance. In Story, Eq. Jur., Sec. 1011, after stating the jurisdiction to protect the surety *quia timet*, there is added: 'And generally it may be stated that in case of contracts, express or implied, courts of equity will interpose to preserve the funds devoted to particular objects under such contracts and will decree what it is in effect specific performance, security to be given, or the fund will be placed under control of the court.' In *Walker* v. *Brown*, 165 U. S. 654, 17 S. Ct. 453, 457, 41 L. Ed. 865, it is held that: 'Every express executory agreement in writing whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other application . . . creates an equitable lien upon the property so indicated.' To the same effect is *Ingersoll* v. *Coram*, 211 U. S. 336, 29 S. Ct. 92, 53 L. Ed. 208. Such a fund is the reserve on a building contract. *Pratt Lumber Co.* v. *Gill* (D. C.), 278 F. 783, 798; *Cox* v. *New England Equitable Ins. Co.* (C.C.A.), 247 F. 955; *Prairie State Bank* v. *United States*, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412; *Salt Lake City* v. *O'Connor*, 68 Utah 233, 249 P. 810, 816, 49 A. L. R. 941. The first and last cited were cases of exoneration. In the last there is a comprehensive review of the authorities with the result thus stated: 'We conclude that the unpaid contract price remaining in the hands of the city is charged with an equity in favor of the surety, which arose by virtue of the retention of the fund by the

city and in point of time relates back to the time the contract of suretyship was entered into, and is superior and paramount to any right of the contractor or his assignee.' Prairie State Bank vs. United States, though a case of subrogation, clearly indicates the status of the reserved payments as a fund for the security both of the obligee and the surety on the bond."

The bill in this case, so far as the application of the doctrine of exoneration is sought, sets up the relationship between the principal, appellant, and the surety, appellee, and recites the outstanding unpaid bills and recites the fund in the hands of the United States payable to the appellant in an amount less than the unpaid outstanding bills, and simply seeks to have the court by appropriate order direct that this fund be paid not to the surety by way of subrogation or not to the surety for any purpose, but only for the payment of the outstanding labor and material bills on the contract, to secure which the bond was given.

In the case of *U. S. F. & G.* v. *Bank of Brewton*, 4 Fed. Suppl. 272, decided by a District Court in Alabama in 1933, the question involved was one of subrogation, but in deciding the case, the court determines the status of the retent on a contract which had been assigned by the contractor to a bank. The court, in determining this question, says, l. c. 274:

"It is held, and I think correctly, in the cases already cited, that as long as this percentage held back to secure the performance of the contract can be identified and followed, it can be subjected in equity to the lien of the surety. There is no doubt

> in this case that the bank received and appropriated the proceeds of this check, and that such portion of it they did not retain was paid out by them in an effort to put it beyond the just claim of those who had the prior right to be paid out of it."

Perhaps the most cited case in the Federal decisions is the case of *Prairie State Bank* v. *United States*, 164 U. S. 227. In every case involving the question arising between the principal and surety by way not only of subrogation, but in exoneration, this case is cited as establishing the status of a fund representing a part of the contract price as between the surety and the principal, or anyone claiming under the principal. Without attempting to burden this record with the holding of the United States Supreme Court in that case, it may be said that the court held that any such fund such as the amount involved in this action is subject to the rights of the surety superior to any right which the contractor might attempt to create in some other persons, and that until the surety has been, in effect, exonerated, the rights of others in such fund do not accrue.

In the case of *Pavarini* v. *Title Guaranty & Surety Company*, 36 App. Cas. (D. C.) 348, Ann. Cas. 1912C, 367, a bill in equity *quia timet* was brought by surety upon the bond given to assure the completion by the principal of a hospital in the District of Columbia and to assure the payment of the bills incurred in such work. A sub-contractor had furnished certain boilers on the job and had demanded payment of the surety. The court sustained the contention of the surety company to exoneration, saying, l. c. 369:

> "The question then resolves itself into this: whether a surety who has not paid the secured debt is entitled to a decree compelling his principal to pay the debt in order to obtain his exoneration from responsibility. The great weight of authority seems to support the proposition that when the obligation has become due, the surety, without discharging it, may maintain a suit, in the nature of a bill *quia timet* to compel his principal to discharge it."

Under this Pavarini case, as shown in Ann. Cas. 1912C, on page 369, is a note setting out a large number of cases to support the general rule stated to be "The reported case is in harmony with the rule which is supported by the great weight of authority that a surety may, after the maturity of the suretyship debt, and without paying the same, maintain a suit in equity to compel his principal to pay the debt." We will not undertake here to cite or refer to all of these cases, but will hereafter discuss some of them.

In *West Huntsville Cotton Mills Co.* v. *Alter,* 164 Ala. 305, 51 So. 338, the court states the rule to be:

> "No principle in equity is more familiar or more firmly established than that a surety, after a debt for which he is liable, has become due without paying or being called on to pay; may file a bill in equity to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby."

In the case of *Ferer* v. *Barrett,* 57 N. C. 455, an action in equity for exoneration was brought by the surety upon a bond conditioned for the payment of certain notes. The court says, l. c. 455:

> "It is the established doctrine in equity that a party, after the debt has become due, may, upon

the principle of *quia timet,* file his bill against the principal and the creditor to compel the former to make and the latter to accept payment; because those parties have no right, against his will, to keep him bound for a longer time than agreed for, so as to enlarge his risk of loss.

"Now, as between Ramson and Barrett, that is substantially the nature of this bill; and it can make no difference that a co-surety, Mosteller, and the creditor, Ferrer, are also plaintiffs, for, as regards the latter, it is only signifying his readiness to accept the payment with the consummation of the suit of the surety, and as regards to the former, asserting his interest in the question and sanctioning the discharge of the debt to his own exoneration. In that point of view the insolvency of the two sureties makes no difference. It might perhaps in the case of a certified bankrupt because the creditor could prove his debt under the commission and the surety and his property are already discharged. But that does not apply to an insolvent in our law, that is, one merely unable to pay his debts and not discharged upon his oath because his person is still liable. Moreover, if so discharged, his subsequent acquisitions may be taken for the debt and that is a danger from which he is entitled to protection. If the money were to go into the hands of the insolvent, it would be an unsurmountable objection to a recovery in law or in equity, as there is no security that he would apply properly and unless he did, the principal would still be liable to the creditor. But the object of all such suits is that the payment should be made to the creditor in satisfaction of the debt and in exoneration of all the parties."

In *Thomas* v. *St. Paul's M. E. Church,* 86 Ala. 138, the rule is stated:

"No principle of equity is more familiar or more firmly established than that a surety, after the debt

for which he is liable has become due without paying or being called on to pay it, may file a bill in equity to compel the principal debtor to exonerate him from liability by its payment, provided no rights of creditors are prejudiced thereby."

It will be noticed in this decision, as in a number of the others, the statement is made that the bill may be entertained after the debt for which the surety is liable has become due. In others, dependent on the facts in each particular case, a somewhat broader statement is made indicating that the surety may bring the bill for exoneration after his obligation becomes due. So far as the right of exoneration is concerned, these statements mean and hold the same thing. In practically every case in which the question is discussed, the right to bring action to recover from the surety accrues at the time of the right to bring action by the debtor, and the term "due" is used somewhat freely. The basis of the whole doctrine, however, is that when the debtor fails to pay the debt for which the bond is given, the right of exoneration accrues. This is necessarily true, for from that moment the cloud to which a number of the cases refer, begins hanging over the head of the surety and it would be idle to give to the surety a right of exoneration when although the debt has matured as to the debtor, the right to sue the surety on this debt which had already matured, is delayed in order to give someone who has a right under the bond prior to that of the creditor himself, a period of time within which to prosecute his right under the bond. As we have stated before, the liability of the surety as in this case, to the materialmen, becomes consummate upon the failure

of the debtor to pay the bill when due, and nothing that can thereafter occur will change this liability. The only thing that can occur is that by reason of the limit of the bond, some of it may be consumed by the application thereof to the prior right, as in this case, the right of the Government. The right of exoneration, it seems to us, would apply with more force in a case of this kind than if the intervening right of the Government did not exist. The cloud hangs over the surety. The fund by which the surety is seeking exoneration, cannot in any manner be obtained or affected by any right which the Government has under the bond. Even if there was a breach of the contract for which the Government had a right of action, its action is only on the bond and not against the fund, and during the attempted enforcement of this right by the Government, the insolvent principal may receive and dissipate the fund out of which the surety is seeking exoneration. For this reason, the petition of the surety company should present more equity to a court of chancery, because the danger incident to the dissipation of this fund is enlarged by the extension of the time permitted by the Government to enforce its rights, if any, against the bond. This period, as we have stated, might extend over a long period of time, during which the insolvent principal might and did express its intention to use a part of the fund other than for the payment of outstanding bills for labor and material on the Batavia job.

In *Hutchinson* v. *Brand,* 79 Kans. 340, 99 Pac. 592, the doctrine is stated thus:

"The only questions raised are whether the petition stated a cause of action, and whether the judgment rendered was a proper one. It is argued that a surety who has paid nothing can maintain no action unless he shows some special reasons for fearing loss as that his principal is about to make a fraudulent disposal of the property. The statute, however (Civ. Code, para. 529), explicitly gives him a right, whenever the debt is due, to sue to compel the principal to discharge it—a right which exists in equity independent of the statute. (27 A. & E. Ency. of L. 475; 16 Encyc. Pl. & Pr. 951.) An attempt of the principal to escape payment by fraud is made a ground of action even before the obligation matures (Civ. Code, para. 530)."

In the case of *Roberts* v. *American Bonding Company*, 83 Ill. App. 463, a deceased person had left certain real estate and also left a large amount of debts for which the real estate would be subject to sale in the probate court. The property was sold by the appellant, the legatee to whom it was devised, and received in payment $70,000.00 in certain bonds. The purchaser required, and was given a bond to protect the land against sale for the payment of debts. There were several thousand dollars in claims proved against the estate, and the principal in the bond filed a motion in the probate court to sell the real estate for the payment of debts. The land was not as yet sold and the liability of the surety, of course, did not accrue until the right of sale had been exercised through the probate court. In other words, the obligee in the bond could not have recovered under the bond against the surety which was on a bond of indemnity, until he had suffered a loss. The surety, however, filed

a bill in equity against the principal in the bond, asking that the principal be required to exonerate the surety by requiring the principal to sell and dispose of the bonds which he had procured as purchase price for the real estate, and out of the proceeds pay these debts and thus exonerate the surety from the payment of them. The court held the surety entitled to this right, stating:

> "As between the principal and appellee, the surety, appellant's duty was to pay the judgment of the probate court. The land she had sold and had been paid for is the only asset of the husband's estate out of which the judgments can be made, and she as executrix has begun proceedings to have the land sold to pay those judgments. According to the terms of the bond given to the purchaser of the land, a breach of the bond seems already to have occurred. Must appellee wait until judgment has been recovered against it for such breach before it can compel appellant to do her duty? It would seem not necessary to do so. There is nothing unliquidated or uncertain in amount. The judgment of the probate court exactly determines the debts of the estate of Roberts, deceased, against which Fuller was indemnified. Nor do we think it necessary that appellee should first pay either Fuller or the probate court judgments that threaten Fuller's title before appellant may be required to perform her legal and equitable duty. Fuller's land is liable for those judgments and both appellant and appellee are obliged to protect him against them. In respect of such obligation as between themselves, appellant is principal and, therefore, primarily liable. Both appellant and appellee hold a part of the mortgage bonds that were taken by the appellant in payment for the land and on their part nothing would be more equitable than a putting by them of said bonds in lieu of the land to satisfy the judgments. What is more equitable than that,

instead of having circuity of action, appellee may require appellant to bring into court her bonds there to be applied, along with those held by appellee and offered to be brought into court, under equitable rules, toward satisfying their joint liability?

"We think this is clearly a case where the surety shall not be required to wait until he has made payment before he may go into equity and compel the principal to pay the debt.

"It is a familiar doctrine of equity that a surety has the right, as against his principal, to be protected from loss by reason of his suretyship, so far as it can be done without prejudice to the rights of the creditor. And so equity will sometimes interfere and compel the principal to exonerate the surety, in advance of payment by or judgment against the surety if the debt is due and it can be done without prejudice to the rights of the creditor. The doctrine in such cases rests upon the simple right, as between principal and surety, that the surety has to be protected by the principal. The form in which that protection may be secured is not material when the right to it exists and can be had without prejudice to the creditor."

In the case of *Pratt Lumber Company* v. *Gill*, 278 Fed. 783, decided by the District Court in North Carolina, the question is presented as to the right of a surety to have a retained percentage under a contract applied to the payment of debts for labor and material on the contract. The question as presented is stated, l. c. 795:

"The question, therefore, to be decided is—What, if any, rights have the surety company in or to the retained percentage due T. H. Gill Company from the highway commission, to have the retained percentage applied to his exoneration of liability on the bond superior to the rights of the creditor representing general creditors?"

In deciding the case, the court refers to many authorities, some of which we have here discussed and among others cites with approval the holding in the Prairie State Bank case hereinbefore referred to, and the statement of the rule in *Town of Gastonia* v. *Engineering Company*, 131 N. C. 359, 42 S. E. 857, where the court said:

> "The American Surety Company having become surety to the engineering company for the faithful performance of said contract, upon any default of its principal by which it became liable on said bond, if it did not become subrogated to the rights of its principal on the bond, it is at least entitled to have it applied in payment of these claims for materials in exoneration of its liability therefor;" and

in the case of *Wells* v. *City of Philadelphia*, 270 Pa. 42, 112 Atl. 867, where the rule is stated:

> "As to any money retained, the surety then stands to that fund in the same position as the owner of the property to which the contract relates. The surety's relation through compulsion (default), dates even with the owner's relation. From this fund, and the unpaid contract price, it is entitled to sufficient to save itself from the loss on its suretyship engagement, nor can the contract, by assignment or otherwise, deprive it of this right."

Following the reference to the above cited cases and many others, the court says, l. c. 798:

> "The authorities cited sustain the right of the surety to have the retained percentages provided for in the contract, applied to the exoneration of loss sustained by breach of condition of the bond."

In *Stulz-Sickles Company* v. *Fredburn Corporation*, 169 Atl. 27, 114 N. J. Eq. 475, the National Surety Com-

pany was surety on the bond of the Fredburn Corporation for the construction of a certain highway. After the completion of the work, a receiver was appointed for the contractor, and the highway commission paid over the balance of the contract price to the receiver. The surety in a bill in equity prayed that the funds so arising from such contract be applied, first, to its right of subrogation, and, second, to its right of exoneration. The right of subrogation was abandoned as no claims had been paid, but the right of exoneration was pressed. The court granted the prayer for exoneration saying:

> "The right of exoneration is merely a right to have the fund applied to the payment of the guaranteed claims. Admittedly the surety is entitled to exoneration and the fund is correctly charged with an equity in favor of the surety to the extent that it be applied to the payment of laborers, materialmen and subcontractors, this right exists irrespective of statute. But it does not entitle the surety to custody or control of the fund . . . The petitioner's right to have the fund applied to the payment of the guaranteed claims (exoneration) will be effectively accomplished by the receiver under the supervision of this court."

In the case at bar, appellee does not request or pray for the custody or control of the fund. It simply prayed for the application of the amount due on the contract to be applied under the supervision of the court to the payment of bills for labor and material as was done in the case just cited.

In *Greenberg* v. *Leff,* 146 Atl. 196, 197, 104 N. J. Eq. 502, which is cited on page 52 of appellant's brief, the court makes this statement:

"But in equity, the surety's remedy is not necessarily confined, as at law, to obtaining indemnity after payment of debt. When protection can be afforded a surety without substantial injury to the creditors, a court of equity may award that relief without the debt being first paid by the surety. In such circumstances, the creditors may be restrained from selling the property of the surety until the property of the principal is first exhausted. Bills of that nature have been classed . . . as bills *quia timet.*"

There would seem to be little room for doubt under, not only the authorities to which we have made reference, but upon an analysis of those cited by appellants, that the appellee is entitled to be exonerated out of the proceeds of the warrant issued for the final payment on the contract on the Batavia job as against the bills for labor and material unless by the granting of such right, creditors of the appellant will be prejudiced.

The only creditors other than laborers and material claimants appear to have been the Maryland Casualty Company, appellee itself, which had advanced some $10,700.00, and an assigned claim to the Ithaca Trust Company from a creditor on the Batavia job. The Maryland Casualty Company itself is asking the relief and could not be heard to say that it was prejudiced. The claim of the Ithaca Trust Company, being an assigned claim growing out of the contract, would be in the same classification as the creditors represented by the claimants for labor and materials furnished, and they would be permitted to participate, and the exoneration requirement

would be as much for their benefit as for the benefit of the other labor and material claimants. The claimants for labor and material could not in anywise be prejudiced because the money was not sought for a purpose adverse to their interests, but was sought for the very purpose of paying them, so far as the money would go. No other creditor, even if there were any, would have any right to this fund, which was superior to the right of the surety company, to have it applied in payment of the bills for labor and material. The very fact that the prayer of the petition and the order of the court was that the money be deposited and disbursed in payment only for labor and material claims, clearly shows that the relief sought and the relief granted instead of being prejudicial to the creditors was for their benefit.

In *Bishop* v. *Day*, 13 Vt. 81, 31 Am. Dec. 582, the rule is stated:

> "After a debt has become due, a surety may resort to chancery to compel the principal to pay the debt that the surety may be exonerated from liability."

In *Holcombe* v. *Fetter*, 70 N. J. Eq. 300, 67 Atl. 1078, the rule is stated:

> "A surety may file a bill to compel payment by the principal debtor as soon as the debt becomes payable. The jurisdiction does not rest upon apprehended insolvency, but upon the fact that there is a debt due, which it is the duty of the principal debtor in exoneration of his sureties to pay forthwith."

See, also, *Dobie* v. *F. & C. of N. Y.*, 70 N. W. 482, 95 Wisc. 540.

Under the foregoing authorities, the District Court was clearly right in granting the relief of exoneration, and the United States Circuit Court of Appeals in error in its suggestion that the right of exoneration had not yet accrued.

VIII.

Summary of the Argument.

To sum up the argument here made by respondent, it is the contention of respondent:

First: That the United States Circuit Court of Appeals had jurisdiction in a case in equity to so modify the decree as to grant the relief which was given by the lower court, for any reason that appealed to such court, even though it granted the relief for a reason other than the reason upon which the District Court based its decree.

Second: That the United States Circuit Court of Appeals was correct in its finding that the respondent was entitled to have the contract of April 28, 1933, specifically performed, irrespective of whether or not there also existed a right of exoneration.

Third: That the contract of April 28, 1933, was binding and was not in anywise modified by any subsequent action by either of the parties so far as it obligated the application of the funds received from the Government to the payment of the bills for labor and material.

Fourth: That the contract of April 28, 1933, was in nowise an assignment of the funds and was not a violation of Section 203, Title 31, U.S.C.A.

Fifth: That in addition to the right of specific performance, the respondent was entitled to have a decree which required the money in the hands of the Government and representing the balance of the contract price, to be applied in payment of the unpaid bills for labor and material performed and used in the construction of the buildings at Batavia, New York, whether it be denominated a right by exoneration or whether it be denominated a trust or lien against the funds.

Respectfully submitted,

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